COLVILLE CONFEDERATED TRIBES COURT OF APPEALS

COLVILLE CONFEDERATED TRIBES v. ST. PETER

Nos. AP92-15400, AP92-15507-15510
(Colv. Ct. App., Sept. 28, 1993)

Summary

The Colville Confederated Tribes Court of Appeals finds that nothing in tribal law or in the tribal constitution, the Indian Civil Rights Act, or the Colville Tribal Civil Rights Act prohibits the tribal court from imposing consecutive sentences on a defendant convicted of multiple offenses and that the tribal court did not abuse its discretion by imposing consecutive jail terms in the instant cases.

Full Text

Before COLLINS, Chief Judge, BAKER and BONGA, Judges

COLLINS, Chief Judge

This matter was brought before the appellate panel seeking review of five maximum sentences imposed by the tribal court in the above cases. In her memorandum opinion, judgment and sentence, dated February 2, 1993, Judge Elizabeth Fry imposed maximum jail sentences for two counts of disorderly conduct, assault, trespass to buildings, and resisting arrest, and specified that each sentence would run consecutively to any other incarceration.

The appellant alleges that the trial court erred by imposing excessive sentences which are arbitrary and capricious and constitute cruel and unusual punishment, and claims his rights were violated under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (ICRA) and the Colville Tribal Civil Rights Act, Title 56.01 *et seq.* (CTCRA). Appellant raises various issues in support of his assignment of error concerning sentencing by the trial court. These issues will be addressed by the panel.

The appellate panel first observes that the myriad of issues raised on this appeal were not fully researched or briefed by appellant's counsel. Consequently, the judges have expended considerable time and effort reviewing decisional law and secondary authority bearing on the issues raised on appeal. Many matters addressed herein are vital to the Colville Confederated Tribes and issues of first impression for the tribal court. The panel believes that when such constitutional issues are raised, appellant's counsel must engage in thorough analysis and briefing during the course of the review process.

I.

The appellant first contends that because the term "sentence" is not defined in the Colville Tribal Code, the term must be given meaning under the laws of the state of Washington. The appellant urges the court to adopt RCW 9.94A.400 in order to give meaning to the term. The term "sentence" is not defined in the tribes' sentencing statute, CTC 2.6.07 and the panel has not found a definition of the term elsewhere in the Tribal Code. The panel also has not found a definition for "sentence" in the state sentencing statute, RCW 9.94A.400.

The Colville Tribal Code provides that the principles of construction at CTC 1.1.07(e) are to be followed when a term is not clear on its face or in the context of the code.

> Whenever the meaning of a term used in this Code is not clear on its face or in the context of the Code, such term shall have the meaning given to it by the laws of

> the State of Washington, unless such meaning would undermine the underlying principles and purposes of this Code.

CTC 1.1.07(e).

The question appellant raises is whether the term "sentence" used in CTC 2.6.07 means fine, jail term, or both. Because the appellant contends that the term, as used in that section, is subject to more than one interpretation, we refer to the pertinent sections of the code and other authority for guidance.

The principles of construction direct the court to follow the plain meaning of terms found in the code.

> Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.

CTC 1.1.07(b). Moreover, the principles of construction also direct the court to "[c]onstrue the Code as a whole to give effect to all of its parts in a logical, consistent manner." CTC 1.1.07(d).

The court will look to the laws of Washington only when the meaning of a term is unclear on its face or in context of the code. Further, the rules of construction instruct the court to use the definition of a term given by the state only if such meaning would not undermine the underlying principles and purposes of the code. CTC 1.1.07(e). In addition to the direction provided by the principles of construction, the Court Rules provide that we may look to other authority for an appropriate definition. CTC 4.1.11.

The panel believes that the term "sentence," both by its facial definition and in the context of 2.6.07, unambiguously means punishment. In that regard, the plain meaning rule in CTC 1.1.07(b) is controlling. It is equally clear that the term "sentence" used in CTC 2.6.07 refers to the punishment to be imposed by the court in a criminal matter following a defendant's conviction of violating a criminal statute. The remaining question is whether the term refers only to confinement in jail.

In reviewing Chapter 5.7 *Penalties* of the Code, usage of the term "sentenced" indicates that the tribal council intended the term to include "[i]mprisonment..., or a fine ..., or both imprisonment and a fine." CTC 5.7.01, 5.7.02, 5.7.03. When CTC 2.6.07 is read together with CTC 5.7.01 *et seq.*, as provided by the of rules of construction, 1.1.07(d), we believe the meaning of the term "sentence" includes imprisonment, a fine, or both.

Even if we assume that the term "sentence" is not sufficiently clear by definition or usage in the code, we note that our interpretation of the term is the same as under Washington and federal decisional law. The Washington courts have defined "sentence" in *State v. King*, 18 Wash. 2d 747, 140 P.2d 283 (1943). In that case Washington Supreme stated as follows:

> In its technical legal signification "sentence" is ordinarily synonymous with "judgment" and denotes the action of a court of criminal jurisdiction formally declaring to the accused the legal consequences of the guilt which he has confessed or of which he has been convicted.

18 Wash. 2d at 753 (citing 24 C.J.S. 15 *Criminal Law* § 1556). Further, the term "judgment" has been defined by the Washington courts as a "determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court." *State v. Siglea*, 196 Wash. 283, 82 P.2d 583.

The federal courts have taken a similar view. A sentence in a criminal case is the action of the court fixing and declaring the legal consequences of predetermined guilt of a criminal offense. *Barnes v. United States*, 223 F.2d 891 (5th Cir. 1955) (citing 24 C.J.S. § 1556). In *Subas v. Hudspeth*, 122 F.2d 85 (10th Cir. 1941) the court differentiated between usage of the term "sentence" as an active verb and as a noun. In a legislative context, the latter denotes the punishment to be imposed on the accused by the court as part of the judgment after conviction of a criminal offense. The punishment or penalty imposed by the trial court must be within statutorily prescribed limits authorized by legislative branch. *United States v. Elkin*, 731 F.2d 1005 (1985), *cert. denied*, 469 U.S. 822, 105 S. Ct. 97, 83 L.Ed.2d 43. Therefore, it is the language of the statute which prescribes the punishment or penalty which may be imposed at sentencing. Further, the statute may provide punishment consisting of a fine, imprisonment, or both.

The legislative branch of government may create a broad sentencing range within which a judge may fix a particular sentence. *United States v. Butler*, 763 F.2d 11. Within the sentencing range prescribed by the legislative body, the judge has broad discretion in determining the sentence. *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592.

Although the panel considers state and federal decisional law to be only advisory, we find that the definition of "sentence" used by those courts is the same as under tribal law. Thus, whether or not the term "sentence" is subject to construction, the court finds that "sentence" means an essential part of a judgment in a criminal case which involves the legal consequences of a confession of guilt or a finding of guilt, punishment. From our reading of the code, it is clear that the tribal council intended, and the panel holds, that "sentence" also means punishment consisting of a fine, a jail term, or both. CTC 5.7.01 *et seq.*

The panel does not read CTC 1.1.07(e) to mean that the court must adopt the Washington sentencing statute, RCW 9.94A.400, in order to give meaning to the term. The panel declines the appellant's invitation to do so. Such a strained application of the principles of construction would seriously undermine the principles and purpose of the code.

II.

We next turn our attention to review of sentences imposed upon the appellant and the sentencing procedures used by the trial court. Appellant contends his right to due process and right to be free from cruel and unusual punishment were contravened under the Indian Civil Rights Act, 25 U.S.C. § 1302(7),(8) and the Colville Tribal Civil Rights Act, Title 56.02(g),(h). Because the appellant claims a violation of his civil rights based upon a tribal and federal statutes, our review will necessarily include principles of tribal and federal law. In *Trial Procedure* set forth in chapter 2.6 of the Tribal Code provides as follows:

> All accused persons shall be guaranteed all civil rights secured under the Tribal Constitution and federal laws specifically applicable to Indian tribal courts.

CTC 2.6.09. We interpret CTC 2.6.09 to mean that a reviewing court must apply the tribal constitution, tribal statutory and common law, and the Indian Civil Rights Act. We will also examine principles applied by the federal courts in sentencing review under the United States Constitution. The federal law principles for sentencing review, cited *infra*, are not "specifically applicable to Indian tribal courts," CTC 2.6.09, *supra*. They are based upon the federal constitutional standards, and not on the tribal constitution or the Indian Civil Rights Act. Therefore, we consider such principles to be advisory only.

III.

The Indian Civil Rights Act, Act of April 11, 1968, P. L. 90-284, §§ 201-203, 82 Stat. 77-78, *codified at* 25 U.S.C. §§

1301-1303, places limitations on the exercise of tribal criminal jurisdiction. Those parts of ICRA which concern the instant appeal state:

> No Indian tribe in exercising powers of self-government shall—
>
> (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year or a fine of $5,000, or both;
>
> (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

25 U.S.C. § 1302(7), (8). We note that the Colville Tribal Civil Rights Act, CTC 56.02(g), closely parallels the operative language in 25 U.S.C. § 1302(7) with regard to prohibitions against imposing excessive bail, excessive fines, or infliction of cruel and unusual punishment. CTC 56.02(h) appears to contain identical language to that found in 25 U.S.C. § 1302(8).

The Indian Civil Rights Act contains similar but not identical provisions as found in the Bill of Rights. *See generally*, Comment, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 Harv. L. Rev. 1343 (1969). The legislative history of the ICRA indicates congressional intent that the Act should be read consistent with the principles of tribal self-government and cultural autonomy. *See* 114 Cong. Rec. 5518, 5520 (1968) (reporting the President's message urging that ICRA be enacted as part of a goal furthering Indian self-determination). *See also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62-64 and nn. 11-15 [5 Indian L. Rep. A-55] (examining ICRA legislative history).

Although the due process and equal protection provisions under ICRA, 25 U.S.C. § 1302(8) are similar to corresponding constitutional principles under the Bill of Rights, they differ both in substance and origin. The panel reads ICRA to mean that equal protection and due process guarantees refer to constitutional protections provided under tribal law and not federal law. *Howlett v. Salish and Kootenai Tribes*, 529 F.2d 233, 237 [3 Indian L. Rep. e-10] (9th Cir. 1976). This interpretation is consistent with view that Congress, with modification, selectively incorporated certain provisions of the Bill of Rights into a substitute bill which was enacted to protect the individual rights of Indians while fostering tribal self-government and cultural identity. Moreover, Congress did so recognizing that coextensive provisions of tribal constitutions and the Bill of Rights would not be identically aligned, *Wounded Head v. Tribal Council of Oglala Sioux Tribe*, 507 F.2d 1079, 1082 [2 Indian L. Rep. No. 1, p. 6] (8th Cir. 1975). *See also Groundhog v. Keeler*, 442 F.2d 674 (10th Cir. 1971). Thus, we interpret ICRA in light of the inherent power of tribes to create and administer a criminal justice system, *Ortiz-Barraza v. United States*, 512 F.2d 1176 [2 Indian L. Rep. No. 4, p. 25] (9th Cir. 1975) and a well-established federal policy of preserving the integrity of tribal governmental structure, including the authority of tribal courts. *O'Neal v. Cheyenne River Sioux Tribe*, 482 F.2d 1140, 1146 (8th Cir. 1973). We also note that federal courts have been careful to construe notions of due process and equal protection under ICRA with due regard for historical, governmental and cultural values of Indian tribes. *Tom v. Sutton*, 533 F.2d 1101, 1104 [3 Indian L. Rep. e-21] (9th Cir. 1976).

We also take note that due process and equal protection guarantees applicable to tribal courts under ICRA flow from congressional exercise of its plenary power, which, despite the United States Supreme Court's pronouncements in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), lack the clear constitutional underpinnings of the Bill of Rights. *See* Pommersheim, *Tribal State Relations: Hope for the Future*, 36 S.D. L. Rev. 239, 247-48. Instead, the origins of such plenary power, if a constitutional source can be found, arise from the Indian commerce clause. United States Const., art. I, § 8, cl. 3. In addition, the legislative history of ICRA clearly indicates that Congress did not intend to impose full constitutional guarantees under the Bill of Rights on litigants coming before the tribal court or to restrict the tribes beyond what was necessary to give the Act the effect Congress intended. *Tom v. Sutton*, 533 F.2d at 1103-04. Among the goals intended by Congress in enacting ICRA were affording constitutional protections to litigants on one hand, and supporting tribal self-government and cultural autonomy on the other. We therefore apply due process principles under ICRA with flexibility and in a manner contextually adapted by the Colville Confederated Tribes.

IV.

We also note that neither the Federal Rules of Criminal Procedure nor the Federal Rules of Evidence have been adopted for use in the Colville Tribal Court. Therefore, the panel will consider case law construing Fed. R. Crim. P. 32 as advisory and will not apply the Federal Rules of Evidence as controlling what evidence is admissible in the tribal court for sentencing purposes. The Federal Rules of Evidence and the Federal Rules of Criminal Procedure are not federal laws which are specifically applicable to Indian tribal courts. CTC 2.6.09, *supra*.

The Tribal Code expressly rejects use of common law rules of evidence, and directs the court to "[u]se its own discretion as to what evidence it deems necessary and relevant to the charge and the defense." CTC 2.6.02. Further, prior to imposing sentencing, the judge is directed to allow a spokesman or the defendant to speak on behalf of the defendant and to *present any information which would help the judge in setting punishment*. 2.6.07 (emphasis added). A literal reading of 2.6.07 shows that the only restriction on what information a spokesman or the defendant may present to the court to consider in sentencing is that the information be of a type which will "help the judge in setting punishment." *Id.* Clearly, such information is strictly within the discretion of the sentencing judge.

The panel has not found any provision in the code which provides guidance as to what information the trial court may consider from the prosecution in sentencing. The panel believes that because the trial court is directed to consider any information from the defense which will be helpful in sentencing, a judge also has broad discretion in determining what information it will consider from the prosecution for that purpose. We emphasize, however, that information which is presented to a sentencing judge by either the prosecution or the defense does not necessarily mean that the judge relied on such information in determining the sentence.

Because the panel has declined to adopt the Washington sentencing statute RCW 9.94A.400 for purposes of statutory construction, the panel also declines to apply substantive provisions of that statute in reviewing sentences imposed by the tribal court. Similarly, Washington case law relating to RCW 9.94A.400 and the Washington Constitution has no application to the questions presented in this case.

V.

The appellant alleges that the trial court erred by considering and relying upon misinformation as to his criminal history at sentencing. The appellant further contends that he has a due process right to be sentenced on the basis of accurate information. The source of the allegedly erroneous informa-

tion referred to by appellant is a computer printout from the Federal Bureau of Investigation.

The record shows that the computer printout was used by the Colville Tribal Court Probation Department to establish at least part of St. Peter's criminal history for the presentence investigation report (hereinafter PSIR). The record also shows that the trial judge at least referred to the printout during the sentencing hearing. However, our review of the record indicates that the trial judge, in response to objections by appellant's counsel, disregarded state convictions reflected in the printout.

During the sentencing hearing, appellant's counsel argued that such computer printouts are unreliable and often contain erroneous information. Appellant's counsel also argued that at least one of St. Peter's criminal convictions shown in the printout was in error. However, defense counsel did not point out which state court convictions were in error or explain the error. He further argued that the PSIR contained erroneous information since the computer printout was used, and that only certified copies of judgments could be used to establish the appellant's criminal history for sentencing.

Appellant cites *Townsend v. Burke*, 334 U.S. 736, ____ S. Ct. ____, ____ L.Ed.2d ____ (1948) in support of his argument that a criminal defendant has a due process right to be sentenced on the basis of accurate information. Appellant's opening brief at 8. In *Townsend, supra*, the court acted on false assumptions as to the defendant's criminal record which were materially untrue. The criminal case relied upon by the trial judge to establish part of the defendant's criminal history, the defendant was denied his right to counsel and the prosecutor misrepresented his criminal record. Two of the defendant's criminal convictions were unconstitutional under *Gideon v. Wainwright*, 372 U.S. 335, ____ S. Ct. ____, ____ L.Ed.2d ____ (1963).

In *Gideon*, the defendant alo requested assistance of counsel and the trial judge indicated, "[i]t was not the practice of the County to appoint counsel for indigent defendants except in murder and rape cases." 372 U.S. at 338. *Gideon* proceeded to represent himself, was convicted, and was sentenced to eight years in prison. The United States Supreme Court reversed Gideon's conviction stating that the right to counsel under amendment VI of the United States Constitution is fundamental and essential to a fair trial. Thus, *Gideon* stands for the principle that, under federal law, it is unconstitutional to try a person for a felony in state court unless he has a lawyer or affirmatively waives his right to be represented. *Burgett v. Texas*, 389 U.S. 109, 114, 88 S. Ct. 258, ____, 19 L.Ed.2d 319, ____ (1967).

In addition to the standards established in *Townsend* and *Gideon*, the United States Supreme Court in *United States v. Tucker, supra*, held that a trial court cannot rely on unconstitutionally invalid convictions in sentencing. In that case, the convictions impermissibly relied upon by the court involved cases in which the defendant was neither informed of his right to counsel nor represented by counsel. Although the sentence was reversed and the case remanded for resentencing, the court upheld the conviction.

The cases cited above involve federal constitutional principles and cannot, without a review of tribal standards, be said to represent an accurate reflection of tribal law. Although the panel does not adopt each principle of law set forth in *Townsend, Gideon*, and *Tucker*, we do hold that a criminal defendant in tribal court has a due process right under the Indian Civil Rights Act and the Colville Tribal Civil Rights Act not to be sentenced on the basis of prior criminal convictions where the defendant was not advised of his right to counsel or was improperly denied his right to counsel. We do not believe that the defendant is denied due process when the trial court considers or relies on criminal convictions in which the defendant was simply unrepresented. We believe that principles of fundamental fairness reflected in the cases cited above are consistent with the language in CTC 56.02(h) and 25 U.S.C. § 1302(8).

Appellant's counsel alleged that one or more of St. Peter's convictions reflected in the FBI computer printout were invalid, but he did not mention which convictions were misrepresented by the printout. We also note that appellant's counsel did not ask the court to convene an evidentiary hearing prior to sentencing so that he could rebut the information contained in the PSIR and computer printout. Rather, appellant's counsel now argues that under Washington law, the tribes were required to prove, by a preponderance of the evidence, what sentence should be imposed on the appellant. Counsel has also advanced the argument that because the computer printouts are not admissible as evidence under the Rules of Evidence, the tribes have not proven by a preponderance that St. Peter should receive an enhanced sentence. Appellant's counsel also argues that under Washington law, a sentencing court may not refer to a computer printout of a defendant's criminal history for purposes of sentencing. Appellant's opening brief at 15 (citing *In re Bush*, 26 Wash. App. 486, 616 P.2d 666 (1980)).

We have stated that Washington law has no place in this analysis. In addition, we find that Washington statutory law with regard to sentencing diverges from CTC 2.6.02 and 2.6.07. Because there is nothing in the Tribal Code or tribal decisional law which precludes use of a computer printout to establish a defendant's criminal history, we find that the principle established by *In re Bush, supra*, does not apply to the cases at bar. The principles set forth in CTC 2.6.02, CTC 2.6.07, and the discretion of the trial judge, control information which may be considered at sentencing.

The federal due process right to be sentenced on the basis of accurate information has been interpreted to mean that a defendant has the right to rebut or explain allegations made at a sentencing proceeding. *United States v. Shepherd*, 739 F.2d 510, 515 (10th Cir. 1984), citing *United States v. Papajohn*, 701 F.2d 760, 763 (8th Cir. 1983), *United States v. Aguero-Segovia*, 622 F.2d 131, 132 (5th Cir. 1980). In sentencing the trial judge may consider uncorroborated hearsay evidence that the defendant had an opportunity to rebut or explain.

In *United States v. Matthews*, 773 F.2d 48 (3d Cir. 1985), the court adopted a test under federal law to evaluate whether a sentence was based on criteria violative of a defendant's due process rights. The test involves two inquiries: (1) whether misinformation of a constitutional magnitude was given [sic] to the court; and (2) whether that misinformation been given specific consideration by the sentencing judge. The federal courts have held, and the panel agrees that factual matters considered as a basis for sentencing must have some "minimal indicium of reliability beyond mere allegation" and must "either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence." *Id.* at 51. The *Matthews* court held that where the defendant had an adequate opportunity to examine and correct controverted information and request an evidentiary hearing, the court did not err by considering such information at sentencing.

Similarly, in *United States v. Monaco*, 852 F.2d 1143 (9th Cir. 1988), the court addressed the question of whether the trial court erred by considering a presentence report containing inaccuracies in sentencing. The court held that in order to successfully challenge a presentence report, that information must lack "[s]ome minimal indicium of reliability beyond mere allegation." Although a defendant must be given an opportunity to explain why he believes a presentence report is incorrect, the scope of the procedure for rebuttal lies within

the sound discretion of the trial judge in "[b]alancing the need for reliability with the need to permit consideration of all pertinent information." Thus, it is within the court's discretion to deny a request for an evidentiary hearing to rebut such alleged inaccuracies. *Id.* at 1148.

In *United States v. Barnhart*, 980 F.2d 219 (3d Cir. 1992), the court sentenced the defendant to five years imprisonment rather than long-term alcohol treatment, as recommended in the presentence report. In that case, the court held that in pre-guidelines cases the sentencing judge may consider a wide range of factors when imposing sentence. Citing *United States v. Tucker*, 404 U.S. 443, the court noted that "[A] judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." A sentencing judge is not obligated to give reasons for imposing a particular sentence. Providing reasons for sentencing is salutary and not mandatory. *United States v. Crow Dog*, 537 F.2d 308 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977).

In *Barnhart, supra*, the court stated that to prove a due process violation, the defendant must show that the challenged information is "(1) false or unreliable, and (2) demonstrably made the basis for the sentence." (Citation omitted.) The defendant bears the burden to show that the information is inaccurate and that the court relied on it. 980 F.2d at 225.

The panel believes that the cases cited above provide sufficient guidance for adopting a scope of review of trial court decisions when the defendant seeks to prove the court violated his right to due process by using inaccurate information in sentencing. We have no difficulty applying those principles to reviewing sentencing procedure under CTC 2.6.02 and CTC 2.6.07, and we hold, that when a defendant's criminal history is considered and relied upon by the trial judge to impose an enhanced criminal sentence, that information must be accurate. However, in order to successfully challenge a sentence imposed by the trial court on due process grounds, the defendant must do more that make a mere allegation that information coming directly before the court or used in the presentence report is materially false. The defendant must ask the sentencing judge for an opportunity to rebut such information and carry the burden to show the information is both material and false. Whether the trial court provides the defendant with an opportunity to rebut such controverted information by continuing sentencing and holding a separate evidentiary hearing is within the discretion of the court. If the trial judge refuses the defendant's request to set an evidentiary hearing on the issue, that decision will be subject to appellate review as to whether the trial judge abused his or her discretion.

Applying the above standards to the cases at bar, we find that the appellant was not denied an opportunity to rebut controverted information about his criminal record. The appellant did not request an evidentiary hearing on the accuracy of information contained in the FBI computer printout and PSIR. Nor has the appellant shown that the trial judge relied on the allegedly false information in imposing the sentences. Thus, the panel does not believe that the appellant has carried his burden in showing (1) the information coming before the court was material and false; and (2) that the court relied on that information in sentencing.

VI.

The appellant also challenges the trial court's refusal to follow the recommendations contained in the presentence investigation report that St. Peter be placed on probation and undergo substance abuse treatment. The PSIR did not recommend that St. Peter be sentenced to imprisonment on any of the five charges. The issue before us then is whether the trial court abused its discretion in sentencing St. Peter to imprisonment rather than long-term substance abuse treatment, as recommended in the PSIR.

The federal courts have held that presentence investigations and presentence reports are intended to provide the trial court with information about the defendant which will enable the court to meaningfully exercise its sentencing authority. *United States v. McCoy*, 770 F.2d 647. A trial court does not abuse its discretion by sentencing a defendant without the aid of a presentence investigation and report when it has sufficient information available to make a fair sentencing determination. *United States v. Latner*, 702 F.2d 947 (Fla. 1983), *cert. denied*, 464 U.S. 914, 104 S. Ct. 274, 78 L.Ed.2d 255.

Although a sentencing judge is required to carefully evaluate the information contained in a presentence report to ensure its accuracy, *in toto* adoption of information contained in presentence reports without regard to erroneous information has given rise to reversal and remand for resentencing. *United States v. Morgan*, 942 F.2d 243 (4th Cir. 1991).

While sentencing judges routinely rely on the recommendations contained in presentence investigation reports, there is good reason for a prudent judge to approach such information and sentencing recommendations contained in the PSIR with deliberation. *Id.* The probation officer has broad discretion as to the information which may be included in presentence reports. Such reports may properly include hearsay which the trial judge may consider at a sentencing hearing, *United States v. Cardinal*, 782 F.2d 34, 37 (6th Cir. 1986), *cert. denied*, 476 U.S. 1161, 106 S. Ct. 2282, 90 L.Ed.2d 724. Even if information contained in presentence reports is accurate, the court must weigh numerous variable and subtle factors which may properly influence his or her decision. These factors *inter alia* include a balancing of sentencing theories. In the end, discretion in sentencing must reside in the trial judge and not in the Probation Department.

In a case strikingly similar to the case at bar, a federal trial judge was held to have properly acted within his discretion by rejecting the sentencing recommendation contained in the presentence report and imposing a five-year jail term. *United States v. Barnhart, supra*. In that case, the sentencing recommendation contained in the PSIR was for long-term alcohol treatment rather than incarceration. The court, observing that the defendant had been given ample opportunities to get his life together, disregarded the sentencing recommendation. The appellate court found that the trial judge, who had previously dealt with the defendant, had adequate information about the offense and the individual to meaningfully exercise his sentencing discretion.

Although there are many reasons for conducting a presentence investigation, the appellant has cited no authority in support of his argument that the trial court must comply with the sentencing recommendations contained in a presentence report. We are aware of no statutory requirement under tribal law which says the trial judge must order a presentence investigation or requires the trial judge to follow the recommendations contained in a PSIR. Further, requiring the trial judge to follow sentencing recommendations of the Probation Department would, in effect, divest the court of sentencing authority. The panel believes this is contrary to the discretionary authority delegated to the trial judge in CTC 2.6.02 and 2.6.07.

Accordingly, we hold that the trial court did not err by refusing to follow the recommendations contained in the PSIR and, instead, imposing successive jail terms.

VII.

We next address whether the trial court abused its discretion by sentencing David St. Peter to five maximum consecu-

tive jail terms. The appellant contends that the trial court abused its discretion by imposing sentences which were arbitrary and capricious and violated the prohibition against cruel and unusual punishment. The appellant advances a number of theories in support of these contentions.

The Colville Tribal Business Council has established a broad range of criminal penalties for offenders who are convicted of violating criminal statutes enumerated in the code. These criminal misdemeanor statutes are divided into three classes, and the penalty range for a given offense is governed by the class to which the particular crime was assigned. A person convicted of "Class A" offenses "shall be sentenced to imprisonment for a period not to exceed 360 days, or a fine not to exceed $5,000, or both the jail sentence and the fine." CTC 5.7.01. "Class B" offenses carry a maximum jail term of 180 days, or a maximum fine of $2,500, or both. CTC 5.7.02. "Class C" offenses carry a maximum penalty of 90 days imprisonment, or a maximum fine of $1,000, or both. CTC 5.7.03. The code is silent as to whether the sentences for offenses arising from the same transaction may be imposed consecutively.

The appellant was convicted of disorderly conduct, CTC 5.5.04, assault, CTC 5.1.03, and trespass to buildings, CTC 5.2.18 which are "Class C" offenses, and resisting arrest, CTC 5.4.17, a "Class B" offense. Thus, the maximum consecutive penalties for all offenses is 540 days in jail, $6,500 in fines, or both. The appellant, having received credit for 10 days of jail time served, was sentenced to a jail term of 530 days. Although the trial court imposed maximum jail sentences on the appellant, she did not impose the maximum penalty available for the offenses.

The language chosen by the tribal business council in CTC 5.7.01 *et seq.* limits the trial court's discretion in sentencing. The various offenses enumerated in the code have been graded into classes for purposes of sentencing. These statutes prohibit the trial judge from imposing a greater sentence for a crime than provided for the class within which the offense falls. Further, all criminal offenses set out in the code are classified as misdemeanors, which, by definition cannot result in imprisonment for more than one year. In addition, the Congress has restricted sentencing authority of the tribal court by placing an upper sentencing limit of one year imprisonment and a fine of $5,000 on the court. 25 U.S.C. § 1301 *et seq.*

We note that the sentences imposed upon St. Peter by the trial judge were within statutory limits. It is evident that the tribal council has delegated considerable latitude to the trial court in sentencing criminal offenders within the statutory limits set out in the code. Because the sentences fall within statutory limits, the appellate panel will review only the process by which punishment is determined rather than make an unjustified incursion into the province of the sentencing judge.

VIII.

We now turn to the appellant's argument that the tribal court abused its sentencing discretion by arbitrarily and capriciously imposing punishment or violating the prohibition against cruel and unusual punishment. We have found no legal precedent under tribal law to guide us in determining when a trial judge abuses his or her discretion in sentencing or when appellate intervention is required. Further, we have stated that Washington statutory law and case law concerning sentencing does not apply to this analysis. Although we are not bound to apply judicially created standards of appellate review of criminal sentencing practices under the United States Constitution, we turn to federal case law to see how these issues have been resolved.

IX.

It is a well-established principle under federal law that sentences imposed within statutory limits are generally not reviewable by the appellate court. *Dorszynski v. United States*, *supra*; *United States v. Tucker*, *supra*. *See also* Wright *Federal Practice and Procedure*, Sentence and Judgment, § 533 (1986). Subject only to the limitations imposed by the statute and Constitution, the punishment to be given a convicted offender is in the discretion of the court. *Robbins v. United States*, 345 F.2d 930 (9th Cir. 1965).

Where it is shown that the trial court failed to exercise its discretion or, in exercising its discretion has manifestly or grossly abused that discretion, will the appellate court intervene. *Giblin v. United States*, 523 F.2d 42 (8th Cir. 1975), *cert. denied*, 424 U.S. 971, 96 S. Ct. 1470, 47 L.Ed.2d 759. The constitutional guarantee of due process continues to operate in sentencing, and circumscribes the court's discretion. *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989). Thus, in appellate review of the judicial process by which a particular sentence is imposed, the court's goal is to "[g]uarantee that the trial judge's discretion actually has been exercised, and that the information relied upon in sentencing is not unreliable, improper, or grossly insufficient." Appellate review of the sentencing process, as distinguished from the length of sentence, is an appropriate area of inquiry. *United States v. Hopkins*, 531 F.2d 576, 580 (D.C. Cir. 1976) (citations omitted).

The federal courts have held that a defendant's due process rights may be violated when the trial court does not exercise its discretion in sentencing. *United States v. Wardlaw*, *supra*. This can be shown where the court maintains a rigid policy of imposing maximum sentences for certain offenses, *United States v. Johnson*, 501 F.2d 826, 830 (7th Cir. 1974), *cert. denied*, 421 U.S. 949, refuses to consider mitigating and aggravating factors in making its sentencing determination, *United States v. Lopez-Gonzales*, 688 F.2d 1275 (9th Cir. 1982), or mechanically imposes punishment based on the type of crime, without considering the characteristics of the offender. *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 1083, 93 L.Ed.2d 637 (1949).

The court must individualize the sentence by considering all the circumstances of the crime and an assessment of the defendant's culpability. *United States v. Barker*, 771 F.2d 1362, 1364 (9th Cir. 1985). Whatever the judge's thoughts might be as to the deterrent value of a jail sentence, he or she must reexamine and measure that view against the relevant facts and other important goals such as the offender's rehabilitation. *United States v. Foss*, 501 F.2d 522, 529 (1st Cir. 1974). Having considered the crime, the surrounding circumstances, the defendant's individual characteristics, and balanced these factors with sentencing theories, the judge must decide what factors, or mix of factors, carry the day. *United States v. Wardlaw*, *supra*; *United States v. Foss*, *supra*.

While the duty of the courts to individualize sentences is clear, in *Baker*, *supra*, the court observed that it may be impossible to develop "a single test or standard sufficient to insure individualized sentencing." 771 F.2d at 1366. The development of any sort of rigid review standard runs a risk of becoming as mechanistic as the sentencing practices the court seeks to avoid.

X.

In conducting this limited review, we emphasize that the due process principles reflected in the cases cited above are federal constitutional standards which cannot be applied without great difficulty to tribal law. Further, the question before us is whether the appellant's due process rights under tribal law were contravened. We believe that such a finding

must precede any determination that the appellant's due process rights were violated under the Indian Civil Rights Act, 25 U.S.C. § 1302(8). Therefore, we adopt a flexible standard of review, utilizing the above principles, to determine whether the appellant was afforded due process under tribal law.

XI.

An examination of the record shows that while David St. Peter was given maximum jail terms for each of five sentences, additional charges of battery and resisting arrest were dismissed as part of a plea bargain agreement. Appellant's opening brief, page 1. In addition, the presentence investigation report indicates that St. Peter has an extensive background of prior offenses and a history of alcohol-related incidents with the tribes. Further, St. Peter has undergone alcohol treatment on four separate occasions.

The record does not show that the trial judge stated her reasons for the sentences she imposed, and we do not believe she was required to do so. It is clear that the trial judge was made aware of the appellant's criminal history and that she considered, at least, tribal convictions in sentencing. In response to the appellant's objections to use of a United States governnment computer printout showing his criminal history, the trial judge indicated that she would not rely on state convictions reflected in the printout, but would refer to the printout for a record of tribal convictions.

The fact that the PSIR was before the court and contained a recommendation to place St. Peter on 18 months probation, with involvement in adult vocational rehabilitation and alcohol programs indicates that the trial judge considered rehabilitation along with deterrence in sentencing. We believe the court was not bound to follow the recommendations of the Probation Department in sentencing. We believe that a trial judge would fail to exercise discretion if she were required to impose sentencing consistent with such recommendations. In view of St. Peter's past criminal involvement, including alcohol-related offenses after undergoing alcohol treatment on four separate occasions, and the dismissed battery and resisting arrest charges, we find the trial judge did not abuse her discretion by rejecting the Probation Department's recommendations for sentencing.

From the preceding discussion, it is clear that the trial judge balanced the value of deterrence in sentencing with St. Peter's likelihood of alcohol rehabilitation and adult educational training as part of probation. It is equally clear that the trial judge determined that rehabilitation was not an appropriate sentencing goal in this instance. In light of St. Peter's past alcohol treatment and continued criminal conduct, we believe the trial judge did not abuse her discretion in reaching that conclusion. From this and the information before the court, we conclude that the trial judge did not mechanically sentence St. Peter. We hold that the trial judge had sufficient information to meaningfully exercise her sentencing discretion and that she exercised her discretion by sufficiently individualizing sentencing so that the punishment fit not only the offenses, but the individual.

XII.

We are not aware of any provision under tribal law that requires a trial judge to make a finding that a defendant would derive no benefit from rehabilitation before imposing a maximum jail sentence. From our reading of the code it is clear that the tribal business council delegated broad sentencing discretion to the trial judge, and imposed no such restrictions on the tribal court.

The appellant invites the panel to adopt a similar sentencing standard as did the Congress in enacting the Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq.*, which has significantly restricted the sentencing authority of federal trial court judges. Under that statute the trial court must make a finding that a youthful offender would derive "no benefit" from rehabilitation before sentencing such offenders under other applicable penal statutes. *Dorszynski v. United States*, 424 U.S. at 442. *See also United States v. Wardlaw*, 576 F.2d at 936-37.

We believe that placing a "no benefit" requirement on the trial court before it can sentence offenders to a maximum jail term would amount to a legislative act by the court and an impermissible incursion into the province of the trial judge. This practice would seriously impair the meaningful exercise of the trial judge's sentencing discretion by, in effect, requiring exhaustion of rehabilitative measures before deterrent sentencing could be considered.

We do not accept the appellant's argument that the trial court erred by not adopting sentencing standards. The tribal business council has adopted sentencing standards by enacting statutes which limit the punishment which may be imposed for specific offenses. We consider the sentencing limitations found in CTC 5.7.01, 5.7.02 and 5.7.03 to be a reflection of legislative intent to restrict the trial court's sentencing discretion. Although the tribal business council has delegated the trial court considerable discretion in sentencing, that discretion is circumscribed by the language in the sentencing statutes. *Id.* The appellant has not challenged the sentencing statutes as being an unlawful delegation of authority to the court. We believe that imposition of additional sentencing standards by the panel on the trial court, acting within the scope of the tribal constitution and the boundaries of its statutorily delegated authority, is a legislative function which should be left to the tribal business council and not the appellate panel.

XIII.

The appellant relies on *Randall v. Yakima Nation Tribal Court*, 841 F.2d 897 [15 Indian L. Rep. 2039] (9th Cir. 1988) as controlling in this case. *Randall* stands for the principle that once a tribe has adopted certain procedures, the tribal court must, as a matter of due process follow those procedures. In *Randall*, the court stated:

> Where the tribal court procedures under scrutiny differ significantly from those commonly employed in Anglo-Saxon society...courts weigh the individual right to fair treatment against the magnitude of the tribal interest in employing those procedures. (Citation omitted.)

Id. at 900. However, where tribal court procedures parallel those found in Anglo-Saxon society, the court will not engage in a complex weighing of interests. In that latter instance, the court will "[h]ave no problem of forcing an alien culture, with strange procedures on these tribes." *Id.* (Citation omitted.)

Thus, where the Yakima Nation had adopted certain procedures governing an appellant's perfection of her right to appeal, and the tribal court deprived the appellant of that right by failing to comply with established court procedure, the Ninth Circuit Court of Appeals had no difficulty applying principles of federal constitutional law and finding that a litigant had been denied due process. *Id.* at 901. We do not believe that *Randall* is applicable to this case for the reason that the Colville Confederated Tribes have not adopted detailed sentencing procedures such as found in the Federal Rules of Criminal Procedure, and we have not found that the trial court abused its discretion in sentencing. We do not find that the procedures followed by the tribal court parallel those found in Anglo-Saxon society. The panel rejects the appellant's view that by adopting procedures similar to those used

by the federal or state courts, the tribes have somehow come within the full reach of the Bill of Rights. This view, which would expand the application of Randall to an area where the tribal business council has delegated considerable latitude to the tribal court, runs counter to the clearly enunciated purpose of ICRA, which affords constitutional protection to litigants while fostering tribal self-government and cultural autonomy. We view the tribal business council's delegation of broad discretion to the tribal court as a statement of policy that the tribal judge is aware of tribal norms and is in a position to apply the law consistent with those values.

The panel also rejects the notion that the doctrine set out in *Randall*, with its harsh result, should apply where the tribal court has adopted procedures designed to provide consistency and accountability in court proceedings. Even if the court should follow the Federal Rules of Evidence or the business council should adopt specific court rules which parallel the federal criminal rules, this does not mean that the tribal culture, tradition and autonomy has been abandoned. Nor does it mean that the tribal court has taken on such an Anglo-Saxon character that the Bill of Rights should be applied. Following this illogical rule would discourage the tribal business council and the tribal court from adopting written, uniform procedures, including those based upon tribal tradition and cultural standards, or other measures which could improve operation of the court.

This does not mean that we believe the reasoning in *Randall* should not be applied in an appropriate case in which the panel finds that established procedural rules have been violated and the prejudice shown is of a nature where no balancing of tribal and individual interests is required. This is not the nature of the case before us. The panel finds that neither the Colville Confederated Tribes nor the tribal court have adopted procedures which, under the rationale of *Randall*, bring the instant matter under the federal review standards of the Bill of Rights.

XIV.

The appellant argues that the sentences imposed by the trial court constitute cruel and unusual punishment in violation of the Colville Tribal Civil Rights Act, CTC 56.02(g) and the Indian Civil Rights Act. 25 U.S.C. § 1302(7). We again turn to a review of federal law, though not binding on this court, to see how the federal courts have addressed this issue.

Sentences that are extremely disproportionate to the offense have sometimes been held to violate the constitutional prohibition against cruel and unusual punishment. *United States v. Wardlaw*, 852 F.2d at 937. (Citations omitted.) The inquiry to be made is "[w]here the sentences were so arbitrary and shocking to the sense of justice as to constitute cruel and unusual punishment." *United States v. Hayes*, 589 F.2d 811 (5th Cir. 1979), *reh. denied*, 591 F.2d 1343, *cert. denied*, 444 U.S. 847, 100 S. Ct. 93, 62 L.Ed.2d 60. To prevail on such a challenge, the appellant must show that the court's action amounted to an arbitrary and capricious action rising to a gross abuse of discretion. *United States v. Small*, 636 F.2d 126 (5th Cir. 1981).

We reiterate the principle that under federal law a sentence within the statutory maximum is only subject to review on appeal for manifest abuse of discretion. *United States v. Johnson*, 507 F.2d at 830-31 (citing *United States v. Tucker*, 404 U.S. at 447). "Only where the trial judge has failed to exercise his discretion, or in exercising his discretion has manifestly or grossly abused that discretion will the appellate court intervene." *Giblin v. United States*, 523 F.2d at 42.

We have found that the trial court imposed sentences on St. Peter that were within statutory limits. Under federal law we do not believe that those sentences were "so arbitrary and shocking to a sense of justice" as to violate the prohibition against cruel and unusual punishment or that the trial judge "manifestly or grossly abused her discretion" by imposing the sentences. Similarly, we have found no support for the appellant's argument under tribal law.

XV.

Finally, the appellant contends that the trial court erred by imposing consecutive rather than concurrent jail sentences, as required under Washington sentencing law. The panel has rejected appellant's argument, based upon the principles of construction, *supra*, that state sentencing law should be applied in order to give meaning to the term "sentence." The panel likewise declines to apply state sentencing law with regard to concurrent sentencing practices.

The appellant has cited no authority under tribal law which requires the trial court to impose concurrent sentences. However, appellant advances the theory that consecutive sentencing in the instant cases has violated his right to due process and his right to be free from cruel and unusual punishment under the Colville Tribal Civil Rights Act, CTC 56.02(g), (h), and the Indian Civil Rights Act, 25 U.S.C. § 1302(7), (8).

The Colville Tribal Code and the Tribal Constitution are silent with regard to whether the trial court should impose concurrent or consecutive sentences. In addition, the panel is not aware of any action by Congress which has divested the tribal court of authority to impose consecutive sentences. Accordingly, the panel concludes that the decision to impose concurrent or consecutive jail sentences is within the discretion of the trial judge. Our review will, therefore, be based on whether the trial judge abused her discretion.

Because there is no tribal common law authority to draw upon for guidance, we again examine federal sentencing law to see how the federal courts have resolved this issue. We reiterate that federal sentencing law is not binding on the tribal court.

Absent statutory direction to impose concurrent or consecutive sentences, federal courts generally are invested with power to choose the manner in which sentences will be served. *See* Wright & Miller, *Federal Practice and Procedure*, Sentence and Judgement, § 32.08[1][c] (1991). The inherent authority of the court to select how multiple sentences will be served assumes that sentencing is for distinct offenses. Only if a statute is ambiguous regarding whether a criminal act warrants separate sentences will the "rule of lenity" be applied. *Id.* (citing *United States v. Zuleta-Molina*, 840 F.2d 157, 159 (1st Cir. 1988)). Absent such ambiguity, the trial judge may impose consecutive separate sentences for the offenses committed.

In *Blockburger v. United States*, 284 U.S. 296, _____ S. Ct. _____, _____ L.Ed.2d _____ (1931), the United States Supreme Court adopted the principle that individual prohibited acts arising from a continuous course of conduct give rise to separate punishments. However, if the course of action which the individual acts comprises the thing prohibited, only a single penalty may be imposed. *Id.* at 302. For multiple punishments, each offense requires proof of a different element.

The *Blockburger* doctrine was upheld in *Gore v. United States*, 357 U.S. 386, _____ S. Ct. _____, _____ L.Ed.2d _____ (1957). In that case the Court distinguished between offenses for which Congress has not explicitly stated what the unit of offense is and a course of conduct involving violation of separate statutes. *Id.* at 391. In the former, where there is lack of definition by the Congress, the court will apply the rule of lenity to favor the defendant.

Congress has since placed controls on sentencing *inter alia* by establishing guidelines for federal courts to follow in

imposing consecutive or concurrent sentences. 18 U.S.C. § 3584. Thus, restrictions on the court's sentencing authority involving multiple offenses is the result of a legislative act, and not court action.

While there has been federal legislation enacted to limit sentencing authority of the federal courts, no similar federal sentencing restrictions have been placed on tribal courts. In that regard, the relevant limitations on tribal court sentencing appear in the Indian Civil Rights Act. The Act provides that no Indian tribe shall "subject any person for the same offense to be twice put in jeopardy." 25 U.S.C. § 1302(3), or "impose for *conviction of any one offense* any penalty or punishments greater than imprisonment for a term of one year or a fine of $5,000 or both." 25 U.S.C. § 1302(8). (Emphasis added.)

The language in 25 U.S.C. § 1302(8) does not contain any indication that Congress intended that tribes refrain from imposing concurrent sentences for multiple offenses. The Act only limits the sentence which may be imposed for any one offense. Further, no restrictions on the court's authority to impose consecutive sentences have been enacted by the tribal business council and none appear in the tribal constitution.

From our discussion of the above authority, we find that nothing in the tribal code, the tribal constitution, ICRA, or CTCRA prohibits the tribal court from imposing consecutive sentences on a defendant convicted of multiple offenses. We also find that the tribal court practice of consecutive sentencing is consistent with pre-guidelines standards followed by the federal courts. However, the rule of lenity set forth in *Gore*, *supra*, is not binding on the tribal court. We believe it is significant that the offenses adjudicated by the tribal court are misdemeanors, and adoption of the rule of lenity would unduly interfere with the court's discretion. Any decision to adopt that rule is a legislative function. Further, federal sentencing guidelines are not binding on the tribal court.

The panel also finds that the decision to impose concurrent or consecutive jail sentences on an offender convicted of multiple offenses is left to the discretion of the trial court. Further, we find that the tribal court did not abuse its discretion by imposing consecutive jail terms in the instant cases.

The judgments and sentences are affirmed.