

FILED

DEC 22 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

OLEH ROSTYSLAW STOWBUNENKO-
SAITSCHENKO,

Defendant - Appellant.

No. 07-10379

D.C. No. CR-06-00869-DGC

MEMORANDUM *

Appeal from the United States District Court
for the District of Arizona
David G. Campbell, District Judge, Presiding

Argued and Submitted November 17, 2008
San Francisco, California

Before: WARDLAW and CANBY, Circuit Judges, and TRAGER **, District
Judge.

* This disposition is not appropriate for publication and may not be
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable David G. Trager, District Court Judge, Eastern District
of New York, sitting by designation.

MEMORANDUM

Oleh Rostylaw Stowbunenko-Saitschenko ("Stowbunenko") appeals his conviction and sentence for Bringing in Illegal Aliens to the United States under 8 U.S.C. § 1324(a)(2) and his conviction for Encouraging Illegal Aliens to Enter the United States under 8 U.S.C. § 1324(a)(1)(A)(iv) and (a)(1)(A)(v)(i). These convictions resulted from an incident in which Stowbunenko, a naturalized American citizen who claims to be a member of an Indian tribe known as the Little Shell Pembina Band of North America ("PNLSB"), issued certificates of PNLSB membership to two Mexican nationals and then attempted to cross the border from Mexico to the United States with the Mexican nationals. At Stowbunenko's urging, the Mexican nationals tried to use their tribal membership documents to secure entry to the United States. Stowbunenko was convicted of the above counts following a jury trial and sentenced principally to time served.

On appeal, Stowbunenko contends that (1) he and the Mexican nationals had a right to cross the U.S.-Mexico border because of their tribal membership as a result of either (a) the PNLSB's aboriginal right of passage or (b) the tribe's inherent sovereign rights,¹ (2) his jury instructions violated the Fifth Amendment

¹ Stowbunenko's brief does not state this claim with precision, but the issue is considered here for the sake of completeness.

in that they instructed the jury to convict without regard to any tribal affiliation, and (3) remand to the district court is necessary (a) to correct the district court's judgment, which erroneously indicates that Stowbunenko's conviction for 8 U.S.C. § 1324(a)(2) is a class E felony, when it is actually a class A misdemeanor, and (b) for resentencing because the district court misunderstood the severity of the offense. This court has jurisdiction pursuant to 28 U.S.C. § 1291.

On all matters of substance we affirm the district court. The case is, however, remanded for the limited purpose of correcting the judgment to reflect that Stowbunenko's conviction for Bringing in Illegal Aliens to the United States under 8 U.S.C. § 1324(a)(2) is a misdemeanor rather than a felony.

DISCUSSION

We reject Stowbunenko's claim that his convictions are invalid because the Mexican nationals, as PNLSB members, had an aboriginal and a sovereign right to cross the U.S.-Mexico border.² First, there is no indication in the record that the PNLSB has either an aboriginal or sovereign right to cross the U.S.-Mexico border. Both of these types of rights require that the claimed right have been traditionally

² It is far from clear that the PNLSB is a recognized Indian tribe and that the Mexican nationals are members. However, these facts are assumed for purposes of argument.

exercised. See Wahkiakum Band of Chinook Indians v. Bateman, 655 F.2d 176, 180 n.12 (9th Cir. 1981) (discussing aboriginal rights); State of Montana v. Gilham, 133 F.3d 1133, 1137 (9th Cir. 1998) (discussing tribal sovereignty).

There is no evidence that the PNLSB exercised a traditional right to cross the U.S.-Mexico border. Indeed, their land claims are in North Dakota and Minnesota – far from Mexico. Nor is there a treaty guaranteeing the PNLSB a right to cross the U.S.-Mexico border. Because there is no aboriginal or treaty right to cross the U.S.-Mexico border, the generally applicable immigration laws govern the defendants' conduct even if they are Indian tribal members. See Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985). This finding also disposes of Stowbunenko's claim that the jury instructions violated his Fifth Amendment rights as the instruction that his guilt did not depend on tribal membership was substantially correct.

Though the convictions stand, a remand is necessary to correct a clerical error in the district court's judgment. Stowbunenko correctly notes that the district court erroneously entered his conviction for Bringing in Illegal Aliens to the United States as a felony when it is in fact a class A misdemeanor. See 8 U.S.C. § 1324(a)(2)(A); 18 U.S.C. § 3559(a)(6). A remand is therefore appropriate to correct this error. There is, however, no basis for resentencing as the district court

appears to have understood the gradation of the charge when it imposed the sentence, if not when it composed its written judgment more than two months later. Accordingly, the case is remanded for the limited purpose of correcting the judgment to reflect the fact that Stowbunenko's conviction for Bringing in Illegal Aliens to the United States is a class A misdemeanor.

AFFIRMED IN PART AND REMANDED IN PART.

United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the file stamp date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1, 2)

- The mandate will issue seven (7) calendar days after the expiration of the time for filing a petition for rehearing or seven (7) calendar days from the denial of a petition for rehearing, unless the court directs otherwise. If a stay of mandate is sought, an original and four (4) copies of the motion must be filed. The mandate is sent only to the district court or agency, we do not provide a copy to the parties.

Publication of Unpublished Disposition (9th Cir. R. 40-2)

- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to 4)

(1) A. Purpose (Panel Rehearing):

- A petition for panel rehearing should only be made to direct the Court's attention to one or more of the following situations:
 - ▶ A material point of fact or law overlooked in the decision;
 - ▶ A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel;
 - ▶ An apparent conflict with another decision of the court which was not addressed in the opinion.
- Petitions which merely reargue the case should not be filed.

B. Purpose (Rehearing En Banc)

- Parties should seek en banc rehearing only if one or more of the following grounds exist:
 - ▶ Consideration by the full court is necessary to secure or maintain uniformity of its decisions; or
 - ▶ The proceeding involves a question of exceptional importance; or
 - ▶ The opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- ▶ A petition for rehearing may be filed within fourteen (14) days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ *See 9th Cir. R. 40-2* (motion to publish unpublished disposition)

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel’s judgment, one or more of the situations described in the “purpose” section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies

- The format is governed by 9th Cir. R. 40-1 and Fed. R. App. P. 32(c)(2).
- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a certificate of compliance found at Form 11.

- If a petition for panel rehearing does not include a petition for rehearing en banc, the movant shall file an original and 3 copies.
- If the petition for panel rehearing includes a petition for rehearing en banc, the movant shall file an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The bill of costs must be filed within 14 days after entry of judgment.
- See attached form for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- Any relevant forms are available on our website www.ca9.uscourts.gov or by telephoning 415 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please notify **in writing within 10 days**:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor), and
 - ▶ Clerk, U.S. Court of Appeals; PO Box 193939; San Francisco, CA 94119-3939 (Attn: Opinions Clerk).

Form 10. Bill of Costs (Rev. 1-1-05)

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____

CA No. _____

The Clerk is requested to tax the following costs against: _____

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1 | REQUESTED Each Column Must Be Completed | | | | ALLOWED To Be Completed by the Clerk | | | | |
|---|--|----------------|------------------|------------|---|----------------|---------------|------------|----|
| | No. of Docs.* | Pages per Doc. | Cost per Page ** | TOTAL COST | No. of Docs. | Pages per Doc. | Cost per Page | TOTAL COST | |
| Excerpt of Record | | | | | | | | | |
| Appellant's Brief | | | | | | | | | |
| Appellee's Brief | | | | | | | | | |
| Appellant's Reply Brief | | | | | | | | | |
| Other | | | | | | | | | |
| TOTAL | | | | \$ | TOTAL | | | | \$ |

Form 10. Bill of Costs - Continued

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: _____

Date: _____

Name of Counsel (printed or typed): _____

Attorney for: _____

Date: _____ Costs are taxed in the amount of \$ _____

Clerk of Court

By: _____, Deputy Clerk