

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

IN THE APPELLATE COURT  
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES  
OF THE FLATHEAD NATION, PABLO, MONTANA

---

Confederated Salish and Kootenai Tribes,	)	
	)	Cause No. AP-17-0433-CR
Plaintiffs/Appellees,	)	
	)	
-VS-	)	
	)	OPINION
Devon Gross,	)	
Defendant/Appellant.	)	
	)	
	)	
	)	

---

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable  
Brad Pluff, presiding.

Appearances:

Robert McCarthy, Confederated Salish and Kootenai Tribes Prosecutors Office,  
Appellee.

James Gabriels, Confederated Salish and Kootenai Tribes Public Defenders Office, for  
the Appellant.

The issue on appeal is whether the Tribal Court abused its discretion when it ordered the  
Defendant to pay a replacement value of \$94.99 for restitution as recommended by the  
Restitution Officer, without making findings to support said restitution amount.

1           **I.       BACKGROUND**

2  
3 Devon Gross was charged with two criminal offenses on April 17, 2017. The first charge was for  
4 trespass for remaining at the residence of Aubrey and Robert Dreebes after being told to leave.  
5

6 The second charge was for criminal mischief for striking and damaging a doghouse while on the  
7 Dreebes' property. Gross pled guilty to both charges on August 7, 2017 as part of a plea  
8

9 agreement between the parties. The agreement provided that the defendant serve 10 days jail (10  
10 days suspended for a period of six months), on the condition he obey all laws and pay an  
11

12 unspecified amount of restitution for a damaged doghouse in an amount to be determined within  
13 30 days. The sentencing order signed by the lower court did not specify a specific amount of  
14

15 restitution. On September 21, 2017, a restitution officer filed a report stating Gross was liable for  
16 \$94.99 in replacement value. Also in the report was a statement indicating Dreebes' would  
17

18 accept half the cost of a new doghouse amounting to \$79.49. The defendant later contested that  
19 any such deal was reached for the \$79.49. The restitution officer's report cites a phone  
20

21 conversation with the victim as to how the \$74.49 value was reached and offers no indication of  
22 consultation with the defendant. Both amounts were submitted to the lower court. No subsequent  
23

24 hearing was held to determine restitution. The lower court acted solely on the restitution officer's  
25 report. There are no findings showing any effort to determine a market value for doghouses in  
26

27 the report. On October 31, 2017, absent any findings to determine restitution costs, the Court  
28 issued a Restitution Order for the replacement value of \$94.99. The order was served November  
29

30 28, 2017. A second order was served January 16, 2018.  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41

1       **II.     ISSUES, APPLICABLE LAW AND STANDARD OF REVIEW**

2           It is the prerogative of this court to establish the standard of review in various classes  
3           of cases if the standard is not established in laws adopted by the Council or by the prior  
4           decisions of this court. In exercising that prerogative, we may look to the standard of  
5           review adopted by other courts. In the Matter of the Burland Estate 2012, Bick V. Pierce,  
6           23 Ind. Law Rep 6175, 6176 (CS&K Court of Appeals 1996).

7           The standard of review of district court decisions to stay or dismiss proceedings  
8           on abstention grounds is abuse of discretion, but to the extent that such a decision rests on  
9           an interpretation of law, our review is de novo. Bank One v. Shumake, 281 F.3d 507 (5<sup>th</sup>  
10          Cir. 2002); Bick v. Pierce, supra. (We review conclusions of law to determine whether  
11          the trial’s court interpretation of the law is correct.)

12       **III.    DISCUSSION**

13           *“When restitution is ordered, the court shall specify the amount, method and payment*  
14           *schedule imposed upon the offender. Before restitution may be ordered, the defendant*  
15           *shall receive notice of the amount and terms requested and shall be entitled to a*  
16           *hearing upon his or her timely request.”* 2-2-1205 Restitution (1) CSKT Laws  
17           Codified.

18           *“Restitution value is determined by the “market value of the property at the time and*  
19           *place of the crime.” If the market value cannot be “satisfactorily ascertained,” and*  
20           *findings show this, “the cost of the replacement of the property.”* CSKT Laws  
21           Codified 2-1-114(37).

22           In the present case, the Tribal Court accepted two guilty pleas from Defendant Devon  
23           Gross pursuant to plea agreement. As part of the plea agreement, the Tribal Court would  
24

1 determine the lawful amount of restitution resulting from the victim's damaged property, a  
2 doghouse.  
3

4 Subsequently, Restitution Officer, Bernie Atwin, spoke with the victims and submitted to the  
5 Tribal Court, a lowest-price replacement value for the property in the amount of \$94.99 on  
6 September 21, 2017. The Defendant objected to the restitution amount on October 2, 2017. The  
7 Tribal Court accepted the restitution officer's value and signed an order adopting this value on  
8 October 31, 2017. The Defendant subsequently filed an objection to the ordered amount. The  
9 objection came after the lower court's Sentencing Order was signed, but before the Tribal  
10 Court's Restitution Order. In Defendant's objection it argued for a market-value method to  
11 determine restitution and argued the amount proposed by the Restitution Officer was too high.  
12 According to the record, there was no hearing to determine if "market" or "replacement" value  
13 was the proper value, nor any hearing was held to determine whether the "replacement" value  
14 proposed by the government was lawful and supported by evidence.  
15

16  
17  
18  
19  
20  
21  
22  
23  
24 *"Before restitution may be ordered, the defendant shall receive notice of the amount and*  
25 *terms requested and shall be entitled to a hearing upon his or her timely request."* Id. In the  
26 present case this court interprets the Tribal Statute cited above in a manner which gives the  
27 Defendant in a criminal matter deference when the due process of the Defendant is at issue. We  
28 find that in matters such as this, "substance over form" must be observed. While it is true, the  
29 Defendant did not file a document titled "Request for Hearing", the Defendant nonetheless did so  
30 in the substance of its pleadings post "notice" of the recommended restitution. It is clear that the  
31 Defendant did not agree to the proposed restitution amount prior to the Tribal Court's Restitution  
32 Order, and that justice and due process dictate that the Tribal Court should have held a hearing  
33  
34  
35  
36  
37  
38  
39  
40  
41

1 on the amount of restitution, if only to determine whether evidence presented by the government  
2  
3 could be contradicted by evidence presented by the Defendant.

4 Therefore it is this Court's opinion, that when the Tribal Court ordered restitution, it did so in  
5  
6 violation of CSKT Laws Codified 2-2-1205.  
7

8  
9  
10 **IV. CONCLUSION**

11 The Tribal Court must ensure a fair process by which it establishes restitution. For the  
12  
13 abovementioned reasons, this case is REMANDED back to the Tribal Court for hearing on the  
14  
15 restitution amount.  
16

17  
18  
19 Submitted this 7<sup>th</sup> day of February, 2019.



*Robert McDonald*

Robert McDonald  
Associate Lay Justice

*Thor Hoyte*

Thor Hoyte  
Associate Justice

*Josh Morigeau*

Josh Morigeau  
Associate Justice

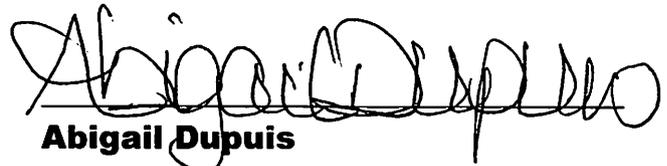
**Certificate of Mailing**

**I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the Opinion to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, this 19th day of March, 2019.**

**James Gabriels  
Defenders Office  
PO Box 278  
Pablo, MT 59855**

**Tribal Prosecutors Office  
PO Box 278  
Pablo, MT 59855**

**Chelsi Camel  
Tribal Court Clerk  
PO Box 278  
Pablo, MT 59855**

A handwritten signature in black ink, appearing to read 'Abigail Dupuis', written over a horizontal line.

**Abigail Dupuis  
Appellate Court Administrator**