

Tamara STOUT, Appellant,
vs.
CHILDREN & FAMILY SERVICES, Tygeer CATHINGS Sr. & Minors, Appellees.
Case No. AP08-006, 5 CTCR 12
9 CCAR 46

[James Edmonds, Office of Legal Services, representing Appellant.
Office of Prosecuting Attorney representing CFS; Tim Liesenfelder, representing father; Appelles.
Trial Court Case No. MI- 2006-26048]

Decided April 22, 2008.
Before Anita Dupris, Chief Justice

This matter came before the Court of Appeals pursuant to a Petition for a Writ of Mandamus filed on April 21, 2008 by Appellant Tamara Stout. Petitioner asks this Court to issue a Writ of Mandamus commanding the Trial Court to set and hold a hearing immediately or return the two minors to their mother. Appellant is also requesting that the Court enjoin Children and Family Services from having *ex parte* contact with the Children's Court. For the reasons stated below the Petition is denied.

FACTS

1. A Petition for Minor-In-Need-Of-Care (MINOC) was filed in the Trial Court on December 26, 2006.
2. The minors were found to be MINOCs and a dispositional hearing held.
3. On March 11, 2008, an Order From Review Hearing was entered by the Trial Court. It was signed on April 7, 2008 and distributed to the parties on April 8, 2008.
4. On April 9, 2008, a letter to Judge Aycock was filed with the Court by a case workers for Children & Family Services (CFS). This letter advised Judge Aycock that the children were being placed out of the home.
5. Spokesperson for CFS moved the Trial Court on April 11, 2008, for a placement hearing, which was subsequently set for April 18, 2008.
6. At the hearing on April 18, 2008, Judge Aycock informed the parties that he was recusing himself because of an *ex parte* communication (voice-mail and e-mail) from the CFS program manager, Lou Stone, to Judge Aycock. The parties were also advised that there would be no judge to hear this matter any earlier than approximately May 5, 2008.
7. There was no written order executed by Judge Aycock.
8. Petitioner filed her request for a Writ of Mandamus on April 21, 2008 asking the

Court of Appeals to compel the Trial Court to set and hold a hearing immediately and to enjoin CFS from having *ex parte* communication with the Trial Court.

DISCUSSION

1. The first relief that Appellant is requesting is for a Writ of Mandamus to compel the Trial Court to set and hold a placement hearing immediately. COACR 5, Jurisdiction, allows for petitions for writs of mandamus to be heard by the Chief Justice or his designee. A review of the record shows that the Trial Court has set a placement hearing for April 29, 2008.

It is within the discretion of the Trial Court to grant or deny continuances. Unless there is a showing of clear abuse of discretion, this Court will not overturn a decision of the Trial Court. *Marchand v. CCT*, 8 CCAR 18, 4 CTCR 19 (05-20-2005).

Writs of Mandamus are issued from courts to compel officials to perform acts that the law recognizes as an absolute duty, rather than acts that may be at the official's discretion. Ministerial acts are those which are performed according to explicit directions by a subordinate official, allowing for judgment or discretion on the part of that official. *Gallaher v. CCT*, 6 CCAR 47(2), 3 CTCR 49 (07-01-2002).

The judiciary was also created by the Tribal Constitution in Amendment X to "interpret and enforce the laws of the Confederated Tribes..." (CCT Constitution), which this Panel understands to mean the judiciary is to make decisions that maintain law and order on the Reservation in a manner that is considered fair and just by the Tribal membership. *Senator v. CCT*, 3 CCAR 63, 2 CTCR 32 (07-24-1996).

The Trial Court currently only has two full-time judges, the Chief Judge and an associate judge. Scheduling of hearings is within the discretion of the Chief Judge. In this case, the matter has been scheduled for a date that is 11 days past the originally scheduled placement hearing which is not unreasonable. The Court of Appeals finds that the Writ for Mandamus is moot and denies the appeal.

2. The second relief that Appellant is requesting is for the Court of Appeals to enjoin CFS from contacting the Trial Court *ex parte*. Chapter 1-2, Rules of Court, § 1-2-4 states that no witness or party of any case shall attempt to discuss any case with any of the judges, except in open court in the course of regular court proceedings. While this Court does not wish to condone such *ex parte* communication, this is not properly before this Court. The Court of Appeals has jurisdiction to hear and determine appeals from the Trial Court's final

judgments, sentences, and disposition orders.

If an issue hasn't been sufficiently developed at the trial level, the Court of Appeals will not address the issue at the appellate level. *Gorr/Stensgar v. CCT*, 6 CCAR 39, 3 CTCR 47 (06-28-2002).

The issue of *ex parte* communication should be addressed at the Trial Court level to allow the Trial Court to fully investigate and determine if sanctions or any other remedy is appropriate. Only then will the Court of Appeals assume jurisdiction to determine if the Trial Court acted within the law.

DECISION

Based on the foregoing, the Writ for Mandamus is denied.

Palmer GUNSHOWS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case No. AP07-003, 5 CTCR 13

9 CCAR 48

[Wayne Svaren, Attorney at Law, Grand Coulee, for Appellant.
Joseph Caldwell, Office of Prosecuting Attorney, for Appellee.
Trial Court Case No. CR-2005-28093]

Decided on June 30, 2008.

Before Dupris, C.J., Nelson, J., and Stewart, J.

Palmer Gunshows was convicted by a jury of Burglary and Attempted Rape. He appeals his conviction on the grounds that his trial attorney provided ineffective assistance by failing to offer a diminished capacity jury instruction; that substantial justice was not done because the trial court judge did not instruct the jury as to diminished capacity; and that the jury did not take enough time to deliberate. We affirm.

Nelson, J.

ISSUES ON APPEAL

The appellant's Amended Notice of Appeal contains three issues: 1) whether the jury deliberated an "appreciable" amount of time before returning its verdict; 2) whether the trial court erred by not offering the jury a diminished capacity instruction; and 3) whether the defendant's trial