FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA

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FORT PECK ASSINIBOINE AND SIOUX TRIBES,
Plaintiff/Appellee,

vs. **Appeal No. 002**

JOHN LAVENDURE,
Defendant/Appellant.

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana, William McClammy, Chief Judge.

FOR APPELLANT, John Lavendure: Pro Se, Poplar, Montana.

FOR APPELLEE, Fort Peck Tribes: Clayton Reum, Tribal Prosecutor, Poplar, Montana.

Briefs were not submitted by Appellant or Appellee. On September 26, 1986, Appellant was not permitted to present oral argument. Appellee, Tribal Prosecutor, Clayton Reum presented an oral argument.

OPINION by Arnie A. Hove, Associate Justice, joined by Julian H. Brown, Chief Justice, and Daniel R. Schauer, Associate Justice.

AFFIRMED AND REMANDED APPELLANT TO TRIBAL COURT.

On or about September 7, 1984, Appellant was charged with three (3) counts of Sexual Assault on an 11 year old boy, 8 year old boy, and a 7 year old girl between July 1 through July 30, 1984. Appellant was to have committed the Sexual Assaults by having sexual intercourse through the anus with each of the victims. All three (3) counts were Class A misdemeanors and the maximum sentences for each count was three (3) months and/or $500.00 fine.

In a trial July 8, 1985 before the Honorable William McClammy, Chief Judge, the court found the Appellant guilty. The court sentenced the Appellant to three (3) months and imposed a $500.00 fine on each count. The sentences were to be served consecutively for a total sentence of nine (9) months and the total fine to be paid was $1,500.00. Furthermore, Appellant was ordered to seek mental health counseling and treatment at his own expense. Appellant presented what appeared to be the following three (3) issues on appeal:

1. Whether Appellant was not read his rights when arrested as required in Title 2, Chapter 2, Section 203 of the Comprehensive Code of Justice of the Assiniboine and Sioux Tribes, and if Appellant was not read his rights was there reversible error.

2. Whether Appellant's convictions for the three (3) counts of Sexual Assault of the 11 year old boy, 8 year old boy, and 7 year old girl were supported by the evidence when Appellant was suppose to have been tested for a venereal disease that the hereinabove victims were diagnosed with and the tests he alleges were negative.

3. Whether the Judge did order Social Services to do a home study and Mental Health to come up with a treatment program within ten (10) days and failure to do so was reversible error.

At the time for oral arguments, Appellant appeared Pro Se and was not permitted to present an oral argument. Rule 6(e) of the Rules of Appellate Procedure reads in full as follows:

> Self—representation. Any party may represent himself/herself before the court with the exception of presenting oral argument. All parties must be represented at oral argument by an attorney or lay counselor qualified and admitted to practice before the Fort Peck Tribal Court.

I.

The trial record and oral argument of Appellee, reveals there was no statement or confession made by Appellant which should have been suppressed. Furthermore, it was determined that there was no illegally obtained evidence which should have been excluded by Title 2, Chapter 3, Section 305 of the Comprehensive Code of Justice. Therefore, Appellant's Issue No. 1 is without merit, has no bearing on the facts in Appellant's case and would not be reversible error.

II.

On Issue No. 2 and the sufficiency of the evidence, Appellant was charged with three (3) counts of Sexual Assault, a violation of Title 3, Chapter 2, Section 214 in the Comprehensive Code of Justice of the Assiniboine and Sioux Tribes. Section 214. reads in part as follows:

> A person who intentionally has sexual contact with another, or who causes such other person to have sexual contact with the defendant, is guilty of Sexual Assault if:...
>
> (b) The other person is under twelve (12) years of age; ....
>
> "Sexual Contact" means any touching of the sexual or other intimate parts of a person with intention of arousing or gratifying sexual desire.
>
> Sexual Assault is a Class A misdemeanor....

In addressing Issue No. 2, this court will follow Rule 8 of the Fort Peck Tribal Court of Appeals Rules of Appellate Procedure. Rule 8 states, "The court shall not consider facts or arguments not presented to the Tribal Court..."

Appellant alleges the victims were supposed to have a venereal disease and Appellant voluntarily submitted to a test for the same venereal disease. Appellant further alleges that the test for venereal disease was negative and thereby proves his innocence. Appellant's allegations are a gross misstatement of the facts considered by the Tribal Court and record before this court. The record indicates there is a request by Clayton Bunt, M.D., Chief Medical Officer to the Fort Peck Tribal Court for an order that John Lavendure be moved to a clinic or hospital for examination for a Contagious Disease. Clayton Bunt, M.D. advised the court of the probable cause being that two (2) minors in the Lavendure household were diagnosed having a venereal disease. Although, a transcript of the Tribal Court proceedings may contradict the above and support the Appellant's allegations, there was no transcript for this court to review and all other evidence as hereinabove set forth and in the record indicates the Appellant's allegations are not true.

The evidence is uncontradicted. The statements given by the victims under twelve (12) years of age indicate the Appellant committed the Sexual Assaults of the victims when he intentionally had sexual contact with them with the intention of arousing or gratifying his sexual desire. From the record before the court and the oral arguments made, it would appear that Tribal Court had sufficient evidence before it to find the Appellant guilty.

III.

Appellant has raised what this court will entertain as Issue No. 3. In the record before this court, it is not clear whether Social Services were ordered to do a home study or Mental Health to come up with a treatment program in ten (10) days. However, whether Social Services or Mental Health were ordered to do anything has no bearing on the Appellant's guilt or innocence or the sentence imposed and therefore is without merit.

THEREFORE, THE COURT OF APPEALS HAVING FOUND NO GROUNDS FOR DISMISSAL OR REVERSAL, UNANIMOUSLY AFFIRMS THE APPELLANT'S JUDGMENTS OF CONVICTION AND SENTENCES IMPOSED BY THE HONORABLE WILLIAM McCLAMMY ON JULY 8, 1985. APPELLANT IS TO IMMEDIATELY BEGIN SERVING HIS THREE (3) MONTHS ON EACH COUNT CONSECUTIVELY FOR A TOTAL TIME SERVED TO BE NINE (9) MONTHS, PAY THE TOTAL FINES OF $1,500.00 WITHIN SIX (6) MONTHS OF HIS RELEASE OR BE MAKING AGREED UPON AND COURT ORDERED PAYMENTS THEREON. FINALLY, APPELLANT IS TO OBTAIN MENTAL HEALTH COUNSELING AND TREATMENT AT HIS OWN EXPENSE WHILE SERVING HIS SENTENCE OR AS SOON AS HE IS RELEASED AND REPORT TO THE TRIBAL COURT WITH HIS MENTAL HEALTH COUNSELOR REGARDING HIS PROGRESS WITHIN SIXTY (60) DAYS OF HIS RELEASE.

In light of a report submitted to the Honorable William McClammy by Paul Curry, Ph.D., Iva W. Trottier, M.A., and Mary Zemyan, J.D., this court must also address the nature of Appellant's crimes and the importance of his compliance with the sentences he received.

The above report recommends Appellant be given the maximum of three (3) months on each count of a Class A Misdemeanor, the sentences to run consecutively and fines totaling $1,500.00. The report also recommended mental health counseling because the Appellant denied and continues to deny the three (3) charges of Sexual Assault.

These sentences were appropriate for the nature of the crimes and ages of the victims, however, Appellant could have been and maybe should have been charged under Title 3, Chapter 2, Section 208 of the Comprehensive Code of Justice for Rape which reads in part as follows:

> A person who engages in a sexual act with another, or causes another to engage in a sexual act, is guilty of rape if:
> ...
> (e) The other person is under twelve (12) years of age; or
> ....
> Rape is a Felony.

If Appellant had been charged under the aforementioned Section, he could have received a longer sentence which would clearly have been appropriate in this case. Because of the above, it is important that Appellant seek and obtain Mental Health counseling and treatment and that he have no future victims.

THEREFORE, APPELLANT IS REMANDED TO THE TRIBAL COURT AND IS TO APPEAR BEFORE THE TRIBAL COURT JUDGE WITH HIS MENTAL HEALTH COUNSELOR AND REPORT ON HIS COMPLIANCE WITH THE TRIBAL COURT ORDER. In the event Appellant has failed to comply with the order and any recommended counseling and treatment, he should be found in contempt and dealt with accordingly.

DONE this _____ day of October, 1986.

BY THE COURT OF APPEALS:

_____
Julian H. Brown, Chief Justice

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Daniel R. Schauer, Justice

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Arnie A. Hove, Justice