FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA 59255-1027

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| FORT PECK ASSINIBOINE & SIOUX TRIBES, | * | Appeal No. 038 |
| Plaintiff/Appellee, | * | |
| vs. | * | O P I N I O N |
| RONALD KEISER, | * | |
| Defendant/Appellant. | * | |

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THIS APPEAL is from Appellant's conviction for Criminal Mischief, a violation of III CCOJ 306, in the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. Honorable Thomas R. McAnally, Juvenile Judge, presided at the trial May 20, 1987.

FOR APPELLANT: Clayton Reum, Lay Counselor, P. O. Box 391, Wolf Point, Montana 59201.

FOR APPELLEE: Emmett Buckles, Fort Peck Tribal Prosecutor, P. O. Box 1027, Poplar, Montana 59255.

OPINION by Arnie A. Hove, Chief Justice, joined by Daniel R. Schauer, Justice, and Gary James Melbourne, Justice.

REVERSED AND REMANDED FOR A NEW TRIAL BY JURY TO BE HELD WITHIN THIRTY (30) DAYS OR AS SOON THEREAFTER AS THE TRIBAL COURT CALENDAR PERMITS.

On January 6, 1987, Appellant was accused by Wilfred H. Smith (hereinafter Victim Smith) of Criminal Mischief, a violation of Title III, Section 306 of the Fort Peck Tribal Comprehensive Code of Justice (III CCOJ 306). Victim Smith accused Appellant of having driven a vehicle through his four wire fence in three different places and doing damage in the amount of $200.00.

The incident was investigated by Officer Shane Gibson who observed the scene of the criminal mischief, gathered and tagged evidence, and took pictures of tire tracks and etc. A trial by judge was held. At the trial, Officer Gibson was not called to testify regarding the pictures and other evidence. Appellant did not do any cross examination of the prosecution's witnesses. The Tribal Court found Appellant guilty of Criminal Mischief, a violation of III CCOJ 306, and awarded Victim Smith $200.00 for damages to his fence.

On appeal, Appellant presented several issues; however, only the following issues will be addressed:

1. Whether there was insufficient evidence to support the verdict.
2. Whether Appellant was denied a speedy trial in this matter.
3. Whether Appellant was denied his right to confront the witnesses against him.
4. Whether Appellant was denied his right to a jury trial.

I.

WHETHER THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE VERDICT.

In reviewing the transcript of the trial, it appears that the Tribal Court had improperly admitted evidence to support its

finding of guilty. Although there was an investigation and evidence gathered which indicated that Appellant and/or Appellant's vehicle had been involved in the Criminal Mischief, the evidence was not properly admitted by the Federal Rules of Evidence (hereinafter FRE) which were formerly adopted by this Court in Fort Peck Assiniboine and Sioux Tribes vs. McDonald, Appeal No. 039, Fort Peck Court of Appeals, March 31, 1988. The Tribal Court actually erred in admitting certain evidence and testimony and violated the Appellant's constitutional rights in asking questions of the Appellant. This opinion will first look at the evidence improperly admitted.

The investigating officer, Shane Gibson, prepared a statement of his investigation and took pictures of the damage to the vehicle. Officer Gibson was not called by the prosecution to testify as to the results of his investigation or to lay a proper foundation for the admission of the pictures of the crime scene. Officer Gibson's statement was excludible as hearsay and the Tribal Court upon its own motion should have excluded the same (See FRE 801).

The transcript reveals the Tribal Court permitted hearsay testimony by Victim Smith of the results of the investigation and that the pictures were taken by the Sheriff's Office. This testimony was excludible as hearsay and the Tribal Court upon its own motion should have excluded the same (See FRE 801). The transcript also reveals Victim Smith was not placed under oath before being permitted to testify. Due process of law under II CCOJ 506(c) requires that, "All testimony of witnesses shall be given orally unde oath in open court and subject to the right of

cross-examination...." Victim Smith's testimony was inadmissible and cannot be used to support Appellant's conviction. Finally, the transcript reveals, the Tribal Court permitted testimony by Ronnie Smith on the pictures and allowed hearsay statements by the prosecutor of statements made by Officer Gibson on what the investigation revealed and the pictures purported to represent. This was all done again in violation of FRE 801.

As a final note, the transcript reveals where Appellant was questioned by the Tribal Court without first advising Appellant of his constitutional right not to be compelled as a witness against himself. 25 USC Section 1302(4).

In conclusion, the Tribal Court improperly admitted evidence to support its finding that Appellant was guilty, and therefore, there was insufficient evidence to support the finding of guilty. Justice requires that this matter be remanded for a new trial, with direction that the Federal Rules of Evidence be strictly followed as to matters of hearsay and the admission of physical evidence, that due process be afforded Appellant, and that all testimony of witnesses be given orally under oath in open court and subject to the right of cross-examination.

II.

WHETHER APPELLANT WAS DENIED A SPEEDY TRIAL IN THIS MATTER.

Appellant was not denied a speedy trial. The Appellant was charged with Criminal Mischief, a violation of III CCOJ 306, on January 6, 1988. Appellant's trial was held on May 20, 1988. In this case it would appear that Appellant, in raising the issue of a speedy trial, is attempting to establish an unreasonable time

limit for trials in criminal matters.

Appellant was not denied a speedy trial in that the same was held within six (6) months of the date of the filing of the Complaint. This Court will not set an unreasonable time limit within which all criminal trials must be held; however, it would seem that since the CCOJ does not address this issue, a trial held within one (1) year of the filing of a Complaint is adequate and would not deny an individual his or her right to a speedy trial.

III.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

Appellant was not permitted the right to examine the witnesses who testified against him. Appellant asked the Tribal Court, "Can I ask a question?" and was told, "You'll get your chance." (T.Tr., P. 6, L 5-6.) The record does reflect that after the above exchange, Appellant was permitted to make a statement; however, nothing reflects that he was specifically asked if he wanted to cross-examine the prosecution's witnesses.

In the trial of any criminal case where a defendant is not given an opportunity by the trial court to cross-examine the witnesses against him, this would be construed as a denial of a individual's constitutional right to confront the witnesses against him. In addition and as hereinabove set forth, in II CCOJ 506(c) due process requires that, "All testimony of witnesses shall be ... subject to the right of cross-examination." Therefore, Appellant was denied his constitutional right to confront the witnesses against him as required by 25 USC Section 1302(6) and was denied due process under the CCOJ.

IV.

WHETHER APPELLANT WAS DENIED HIS RIGHT TO A JURY TRIAL.

In reviewing the documents in the Tribal Court file, there does not appear to be a document where the Appellant made a knowing waiver of his right to a trial by jury. Furthermore, there is no transcript of the arraignment in the file whereby Appellant made a knowing waiver of his right to a trial by jury. In the transcript of the trial, Appellant asserted his right to trial by jury and he denied that he had requested or agreed to a trial by judge.

At the bottom of Appellant's Complaint it is noted that there will be a Trial by Judge and that Leighton Reum is his counsel. Regardless of the above, Appellant requested a trial by jury and without a signed knowing waiver of that right or a transcript of the arraignment whereby Appellant made a knowing verbal waiver, it was inappropriate to proceed with a trial by judge. (And it was also inappropriate for a judge to have handled the trial when he was related to the victim.)

Therefore, Appellant's trial shall be by jury with direction to the Tribal Court that all trials are to be by jury unless the defendant has signed a waiver of his/her right to a jury trial or made a knowing verbal waiver of his/her right to a jury trial at the time of arraignment and a tape and/or transcript of the proceedings provides proof of the same.

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REVERSED AND REMANDED FOR A NEW TRIAL BY JURY TO BE HELD WITHIN THIRTY (30) DAYS OR AS SOON THEREAFTER AS THE TRIBAL COURT CALENDAR PERMITS.

DONE this 4th day of August,1988.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Daniel R. Schauer, Justice

Gary James Melbourne, Justice