FORT PECK COURT OF APPEALS
ASSINIBOINE AND SIOUX TRIBES
FORT PECK INDIAN RESERVATION
POPLAR, MONTANA
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FORT PECK ASSINIBOINE & SIOUX TRIBES,
Plaintiff/Appellee,

vs. **Appeal No. 039**

RICHARD MCDONALD,
Defendant/Appellant.

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OPINION
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THIS APPEAL is from a jury verdict finding Appellant guilty of driving while under the influence (DUI), a violation of Title IX, Section 107, of the Fort Peck Tribal Comprehensive Code of Justice (IX CCOJ 107), in the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable Julian H. Brown, Lawyer-Judge presided.

FOR APPELLEE: Emmett Buckles, Tribal Prosecutor, Wolf Point, Montana.

FOR APPELLANT: Laura Christoffersen, Attorney at Law, Wolf Point, Montana.

Appellant filed a brief with the Clerk of the Fort Peck Tribal Court, Appllee filed no brief. On November 20, 1987, Appellant and Appellee presented oral arguments.

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

HELD: THE APPELLANT'S CONVICTION FOR DXRIVING WHILE UNDER THE INFLUENCE, A VIOLATION OF IX CCOJ 107, IS REVERSED AND REHANDED TO TRIBAL COURT FOR A NEW TRIAL.

During the early morning hours of march 24, 1987, Appellant was arrested for driving under the influence, a violation of IX CCOJ 107. A Jury trial was held on July 28, 1987. The jury found the Appellant guilty.

Appellant filed a motion in limine with a brief in support of motion in limine and the hearing was held before the trial on July 28, 1987. At the hearing, the evidence presented by Appellant indicated that the Prosecutor (Appellee) had not subpoenaed the necessary witnesses to lay the roper foundation for admission of the blood test as evidence. The evidence presented by Appellant also indicated that the blood test had not been adminstered by an authorized person under the Tribal code, i.e., a physician or registered nurse.

At this hearing, the Prosecutor did not have the analyst from the State Crime Lab present to rebut the evidence presented by Appellant in support of Appellant's position that a proper foundation could not be laid. Regardless of the above, the Tribal Court refused to grant Appellant's motion and reserved its ruling until the time of trial.

At the trial, the prosecutor attempted to introduce the results of the blood test. The prosecutor was unable to establish that the test was taken by an authorized person under the Tribal code. The prosecutor also failed to have the analyst subpoenaed to testify as to the results of the test on Appellant's blood sample submitted to the State Crime Lab. Upon the objection of Appellant's counsel, the results of the test were not admitted.

Appellant contends that not a single witness testified produced any competent evidence that he was under the influence of alcohol. Appellant also contends that not a single witness, including the three (3) police officers, testified regarding any physical tests or the results of the blood alcohol test which was drawn from him. Finally, Appellant contends that the prosecution offered absolutely no evidnece which would prove that he was "under the influence: to the degree required by the code,

Appellant's Brief presented two (2) issues. This Court will address Appellant's two (2) issues and also Appellant's contentions. Appellant's issues were as follows:

1. WHETHER THE PROSECUTION DID NOT MEET ITS BURDEN OF PROOF WHICH IS TO SHOW THAT THE DEFENDANT COULD NOT SAFELY OPERATE A MOTOR VEHICLE.
2. WHETHER SPECIFIC RULES OF EVIDENCE AND GUIDELINES FOR PROOF SHOULD BE PROVIDED BY THIS COURT AS A RESULT OF THIS CASE TO AID PROSECUTION AND DEFENSE IN CRIMINAL ACTIONS.

Before addressing Appellant's two (2) issues, the Court will address the following issue:

> WHETHER THE FORT PECK COURT OF APPEALS HAS JURISDICTION TO HEAR THIS APPEAL, AND IF SO, WHAT THE COURT SHALL REVIEW.

This Court has jurisdiction of appeals as granted in I CCOJ 202.

I CCOJ 202 reads in part as follows:

> "The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Tribal Court on matters of law, but shall not set aside any factual determinations of the Tribal Court is such determinations are supported by substantial evidence..."

Title I CCOJ 202 grants this Court jurisdiction over appeals from final orders and judgments of the Tribal Court. In criminal cases, the defendant is given the absolute right to an appeal from a judgment of conviction. The jury verdict of guilty is a judgment of conviction and Appellant has exercised his absolute right to appeal the same and, before granting Appellant's appeal, this Court determined that Appellant had followed the requirements of I CCOJ 206.

Therefore, this Court has jurisdiction and will review de novo all determinations of the Tribal Court on matters of law and will not set aside factual determinations by the Tribal Court supported by substantial evidence.

I.

> WHETHER THE PROSECUTION DID NOT MEET ITS BURDEN OF PROOF WHICH IS TO SHOW THAT THE DEFENDANT COULD NOT SAFELY OPERATE A MOTOR VEHICLE.

The Appellant was found guilty of violating IX CCOJ 107. This statute reads in part as follows:

> (a) It is unlawful and punishable for any person who is under the influence of intoxicating liquors, under the influence of any drug, or under the combined influence of alcohol and any drug, to a degree which renders him incapable of safely driving a motor vehicle to operate or be in actual physical control of any

motor vehicle upon the highways or roads of the Reservation.

Pursuant to III CCOJ 103, the Tribe has the burden of proof in proving violations of the Tribal code. This section reads:

> (a) The Tribes have the burden of proving each element of an offense beyond a reasonable doubt.
>
> (b) Whenever the defendant introduces sufficient evidence of a defense to support a reasonable belief as to the existence of that defense, the Tribes have the burden of disproving such defense beyond a reasonable doubt, unless this Code or another ordinance expressly requires the defendant to prove the defense by a preponderance of evidence.

In this case the Tribe must prove that the Appellant was under the influence of intoxicating liquors, under the influence of any drug, or under the combined influence of alcohol and any drug, to a degree which renders him incapable of safely driving or being in actual physical control of a motor vehicle upon the highways or roads of the Reservation. Appellant contends that the prosecution offered absolutely no evidence which would prove he was "under the influence" to the degree required by the code. Before addressing this contention, the types of evidence that can be presented by the prosecution to prove Appellant's violation of IX CCOJ 107 will be discussed.

Title IX CCOJ 109 sets forth three (3) types of evidence which are admissible and can be used to prove a violation of IX CCOJ 107. In IX CCOJ 109 (a) a blood, breath, or urine test is admissible as follows:

> Upon the trial of any criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs, evidence of the amount of alcohol in the person's blood at the time of the act alleged as show be a chemical analysis of his blood, breath, or urine is admissible.

Although a blood, breath, or urine test is admissible, in this case since the issue has been raised, we must look at whether Tribal code and other appropriate procedures for administering blood tests were followed. title IX CCOJ 108 sets forth the procedure for administration of any of the tests where a person is alleged to be driving a vehicle while under the influence of intoxicating liquor. Title IX CCOJ 108(a) restricts the administration of a test and reads in pertinent part:

> "This test shall be administered at the direction of an arresting police office having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle upon the highways and roads of the Reservation while under the influence of intoxicating liquor..."

In the above section, only an arresting police officer with reasonable grounds to believe a person is driving under the influence of intoxicating liquor may have the test administered. The police officer may also designate which test is to be administered; however, if the officer designates that a blood test is to be administered under IX CCOJ 108(c), only two (2) individuals are authorized to administer the same. This section reads in applicable part as follows:

> "If the test to be given is a blood test, only a physician or registered nurse acting at the request of a police officer may administer the test..."

The evidence presented at the motion in limine hearing was un-contradicted, in that Appellant's blood was taken by Ann Johnson, a lab technician. There was no evidence that Ann Johnson was a physician or registered nurse and if Appellant's blood test was not administered by an authorized person, a proper foundation could not be laid. When the prosecution clearly demonstrated an inability to lay the proper foundation, it was error for the Tribal Court to refuse to grant Appellant's motion in limine and to

allow into evidence testimony of the blood alcohol test report or testimony on the report and require Appellant to make objections to the same at the trial.

Appellant has suggested that specific rules of evidence and guidelines for proof should be provided by this Court to aid prosecution and defense in criminal actions, and, because of the above, we concur. Before discussing the other two (2) types of evidence that are admissible and can be used under Title IX CCOJ 109 to prove a violation of IX CCOJ 107, this Court will adopt specific rules of evidence and guidelines for proof to aid the prosecution and defense in criminal and driving under the influence actions.

In Fort Peck Assiniboine and Sioux Tribes vs. Linda Clark, Appeal No. 036, this Court adopted the applicable laws section for civil procedure at IV CCOJ 501 and found it necessary to apply the same to the criminal procedure until such time as the CCOJ is amended to include an applicable laws section for criminal procedure. In IV CCOJ 501, "where appropriate, the Court may in its discretion be guided by statutes, common law or rules of decision of the State in which the transaction or occurrence giving rise to the cause of action took place."

in this case, Appellant was convicted of the charge of driving under the influence under the Tribal code which mirrors the Montana driving while under the influence statute. Therefore, it is appropriate for this Court to be guided by Montana cases in which the issues of the admissibility of blood tests or other evidence are raised.

In State vs. Robert Raymond McDonald, 697 P.2d 1328 (Mont. 1985), the trial Court allowed into evidence the blood alcohol test report and testimony on the report without a proper foundation. The report did not contain the name or initials of the person who withdrew the blood for the purpose of determining the blood alcohol content. The officer could not recall the person who drew the blood sample at the hospital but only testified that was only wearing a tag which said registered nurse. In the Montana case, the Court said,

> "We hold that a criminal defendant on a charge of driving under the influence is entitled to the procedural safeguards of the Administrative Rules of Montana. To admit evidence of blood alcohol content and a test report, the State must lay a foundation pursuant to the Section 61-8-404, M.C.A., which incorporates the A.R.M.: (1) the laboratory analysis must be done in a laboratory qualified under the rules of the Department; (2) the report must be prepared in accordance with the rules of the Department; and (3) if a blod sampling, the person withdrawing the blood must be demonstrably qualified to do so." Id. at 1331-1332.

In the Montana case, the Court established procedural safeguards and gave guidelines for laying a proper foundation pursuant to the State law, In the present case, this Court will establish procedural safeguards and give guidelines for laying a proper foundation purusant to the Tribal code.

Under the Tribal code, the Prosecutor must first lay the foundation required by IX CCOJ 108(c) and demonstrate that a physician or reigstered nurse, acting at the direction of a police officer took the blood sample. The next step is to determine that appropriate procedural safeguards have been followed.

In this case, Appellant's blood test was mailed to the State Crime Lab in Missoula. In part, the Tribal code mirrors Montana law although it does not specifically incorporate the Administrative Rules of Montana (hereinafter A.R.M.). Because the Montana case required a State or local law enforcement officer, submitting a blood sample to the State Crime Lab, to follow procedural safeguards set forth in the A.R.M. to insure an accurate test and enable the laying of a proper foundation, it would be appropriate to adopt the same safeguards under the Tribal code. While Tribal law enforcement officers continue to submit blood samples to the State Crime Lab for analysis, it is only reasonable to require that the A.R.M. be followed where an Indian is arrested for driving under the influence within the exterior boundaries of the Reservation.

Therefore, the A.R.M. are hereby adopted as guidelines and necessary safeguards that must be followed

in obtaining blood samples for testing at the State Crime Lab until such time as the Tribes adopt their own procedural safeguards in obtaining blood samples or designate their own lab for conducting blood tests, or both.

The following will set forth the primary rules of the A.R.M. to be followed by Tribal law enforcement officers before evidence of a blood, breath, urine test can be admitted in a driving under the influence action. A.R.M. Section 23.4.131 addresses the method of taking blood samples and reads in part as follows:

> "(1) Blood samples may be collected from living individuals only by persons authorized by law, upon written request of a peace officer. The skin at the area of puncture must be thoroughly cleansed and disinfected with an aqueous solution of nonvolatile antiseptic (e.g. Zephiran chloride, Betadine, Etc.). Alcohol of phenolic solution may not be used as a skin antiseptic.
>
> "...
>
> "(3) The blood sample must be deposited in a clean dry container. The container should then be capped or stoppered, sealed and the following information provided:
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> > "(a) Name of subject;
> >
> > "(b) Date and time of collection;
> >
> > "(c) Name or initials of persons collecting and/or sealing sample.
>
> "(4) Sodium flouride or its equivalent may be used as a preservative. Sodium citrate or potassium oxalate or equivalent may be used as an anticoagulant. If no additive or additives are used, a statement so stating should accompany the sample. If other additives are employed, the name of the additive and its quantity should be listed.
>
> "(5) When possible, the officer requesting blood sampling shall observe collection of the sample so that he or she may attest tot he sample's authenticity. The officer should then initial or mark the sample seal for further identification."

A.R.M. Section 23.4.133 addresses the method of taking breath samples and reads as follows:

> "(1) Breath samples must be collected according to techniques supplied by the manufacturer of the testing or sampling device employed.
>
> "(2) Breath samples taken outside an installation by an alcohol capture device may only be taken by a person who has been trained and certified as an operator. The sample should be sealed and the following information provided:
>
> > "(a) Name of subject;
> >
> > "(b) Date and time of collection; and
> >
> > "(c) name or initials of person collecting and/or sealing sample.
>
> "(3) The quantity of breath may be established only by direct volumetric measurement, or by collection and analysis of a fixed breath volume."

A.R.M. Section 23.4.132 addresses taking urine samples and reads in part as follows:

"(1) Urine sampling should be considered only when other methods of determining equivalent alcohol concentrations in breath or blood are not practical, except when the urine sampling is performed under strictly controlled conditions (e.g., hospitalized subject), or when the urine sample is performed for the limited purpose of demonstrating recent ingestion of alcohol. Chemical tests of breath or blood are preferred.

"(2) When urine collection is necessary, the subject should empty his or her bladder. Twenty (20) minutes after first voiding the bladder, a urine specimen should be collected and deposited into a clean, dry container and capped or stoppered. The container should be sealed and the following information provided:

"(a) Name of subject;

"(b) Date and time of collection; and

"(c) Name or initials of person witnessing collection and/or sealing sample.

"(3) Urine samples collected from living individuals must be witnessed to assure that the sample may be authenticated.

"(4) If preservatives are used, a comment specifying the preservative and amount used should accompany the sample.

"..."

Title IX CCOJ 109 sets forth the two (2) other types of evidence which are admissable and can be used with or without a blood, breath, or urine test to prove a violation of IX CCOJ 107. Each type of evidence will be addressed and, if necessary, procedures and safeguards established for admitting the same at a trial or hearing.

The first type of admissible evidence is a refusal to submit to a blood, breath, or urine test. Appellant did not sign a consent form; however, he submitted to a blood test. Appellant did not sign a consent form; however, he submitted to a blood test. in the event Appellant did not sign the consent form and had refused the blood, breath, or did not sign the consent form, and had refused the blood breath, or urine test, evidence of this refusal would have been admissible under IX CCOJ 109(b)/ This section reads,

"If the person under arrest refused to submit to the test as hereinabove provided, proof of refusal shall be admissible in any criminal action or proceeding arising out of acts alleged to have been committed while the person was driving or in actual physical control of a motor vehicle upon the highways and roads of the Reservation while under the influence of intoxicating liquor or drugs."

The procedure for admitting evidence of a refusal would be the testimony by the arresting police officer that a test was requested and refused and the offer into evidence of the unsigned consent form to corroborate the refusal. The procedural safeguards before admitting this type of evidence would be requiring the prosecution to lay a proper foundation and follow appropriate rules of evidence. This Court will discuss and set forth appropriate rules of evidence for the Tribal Court in addressing Issue No. II.

In addition to the blood, breath, or urine test or refusal to submit to the same being admissible to prove a violation of IX CCOJ 107, other competent evidence is admissible under IX CCOJ 109(c). This section reads as follows:

"The provisions of this section do not limit the introduction of any competent evidence bearing on the question of whether the person was under the influence of intoxicating liquor or drugs."

Having discussed the three (3) types of admissible evidence and before being able to properly answer Issue No. 1, Appellant has made certain arguments regarding the degree of impairment and the proof necessary to support a conviction of driving under the influence under Tribal law which must be addressed.

Appellant argues that the Tribal law on the degree of impairment differs greatly from Montana law in that Montana law provides that the "slightest degree" of impairment is sufficient to support a conviction and that Tribal law requires proof that the person is impaired to a degree which renders him incapable of safely operating a motor vehicle. Appellant also argues that this Court should take a look at recent Montana Law Review article which fairly well lays out the concept of "under the influence." This article reads in part,

> "'Under the Influence' is a question of fact describing the level of driving impairment that alcohol consumption must cause in order to secure a D.U.I. statute is generally held to be determinative in deciding if a drive has reached a proscribed level of impairment. In Montana, a drive is criminally culpable if his intoxication affects in the 'slightest degree' his ability to operate a motor vehicle. Factors that have been held to support a finding of intoxication include: testimony as to the actual amount of alcohol consumed, the smell of liquor, glassy eyes, and unstable or clumsy locomotion; testimony of observers, particularly trained observers such as law enforcement officers, doctors, nurses; confusion, disorientation, and unreponsive and incoherent answers to questions; and slurred speech and admissions by the defendant about how much alcohol he has ingested." 46 Mont.L.Rev. 313-314 (1985)"

In reading the above, Appellant correctly argues that Montana law requires only a diminishment of a person's ability to drive and that Tribal law requires more. Nonetheless, the evidence necessary to prove a diminishment of a person's ability to drive or to prove a degree of intoxication rendering a person incapable of safely driving would be similar. Furthermore, the "other competent evidence" contemplated by IX CCOJ 109(c) could only be that type of evidence discussed as factors in the Montana Law Review article that support a finding of intoxication under Montana Law.

The described Montana Law Review article will hereinafter be a guideline for proof of intoxication with other "competent evidence" to the degree contemplated by the Tribal code. The type of evidence discussed in the article has been held to support a finding of intoxication in Montana where a driver is criminally culpable if his intoxication affects in the "slightest degree" his ability to operate a motor vehicle. This same evidence will be held to support a finding of intoxication on the Reservation where a drive is criminally culpable if his intoxication renders him incapable of safely driving a motor vehicle.

In conclusion, the presentation of testimony on the blood test was error when the hearing on the motion in limine demonstrated that the Prosecutor could not lay a proper foundation. Therefore, the Tribal Court should not have permitted evidence or testimony on the blood test. Appellant's contentions that not a single witness testified or produced any competent evidence that was under the influence of alcohol and that the prosecution offered absolutely no evidence which would prove that he was "under the influence" to the degree required by the code are not correct. In reviewing the transcript, the prosecution did present other admissaible evidence contemplated by IX CCOJ 109(c) in the nature of testimony from law enforcement officers and other witnesses. It would be inappropriate for this court to comment on whether any of the testimony was competent or whether it was sufficient to support a conviction without the blood test.

Therefore, this matter is remanded to Tribal Court for a new trial.

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II.

WHETHER SPECIFIC RULES OF EVIDENCE AND GUIDELINES FOR PROOF SHOULD BE PROVIDED BY THIS COURT AS A RESULT OF THIS CASE TO AID PROSECUTION AND DEFENSE IN CRIMINAL ACTIONS.

The second issue was addressed in part in this Court's discussion of the first issue. In the discussion of the first issue, this Court adopted standards for the admissibility of evidence of a blood, breath, or urine test by requiring that the safeguards in the Tribal code be strictly followed and by adopting the A.R.M. for blood, breath, or urine test submitted to the State Crime Lab.

On the remaining part of this issue as to providing specific rules of evidence and because of the problems as to the admission of certain evidence in the trial of this case, it would be appropriate to adopt rules of evidence to be adhered to in Tribal Court for subsequent trials and hearings. Because a Tribal Court decision or Appellate Court opinion could possibly be reviewed by a Federal Court, hereinafter, the Federal Rules of Evidence shall be followed in all Tribal Court proceedings. This Court deems it appropriate that Tribal Prosecutors, Public Defenders and Lay Counselors and Attorneys practicing in Tribal Court to familiarize themselves with the Federal Rules of Evidence and hereinafter apply the same in Tribal Court proceedings.

Therefore, this Court adopts the Federal Rules of Evidence and any issues regarding evidence prsented in subsequent appeals will be reviewed accordingly.

IT IS THE UNANIMOUS DECISION OF THIS COURT TO HOLD THAT APPELLANT'S CONVICTION FOR DRIVING WHILE UNDER THE INFLUENCE, A VIOLATION OF IX CCOJ 107, IS REVERSED AND REMANDED TO TRIBAL COURT FOR A NEW TRIAL.

DONE this 31st day of March,1988 .

BY THE COURT OF APPEALS:

_____
ARNIE A. HOVE, Chief Justice

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DANIEL R. SCHAUER, Associate Justice

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GARY JAMES MELBOURNE, Associate Justice