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

FORT PECK TRIBES,
Plaintiff/Appellee

vs.

Appeal No. 046

MARK CHARETTE, a minor,
Defendant/Appellant

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Wolf Point, Montana, the Honorable Violet E. Hamilton, presided.

ARGUED: September 26, 1988 DECIDED: September 26, 1988.

FOR APPELLANT: Clayton Reum, Lay Counselor, 821 6th Ave. So., Wolf Point, Montana 59201.

FOR APPELLEE: Ron Arneson, Special Prosecutor, P.O. Box 1133, Wolf Point, Montana 59201.

CRIMINAL: TRIBAL JUDGES HAVE DISCRETION TO DECLARE A MISTRIAL OR GRANT A MOTION TO DISMISS IN A CRIMINAL PROCEEDING AND THIS IS NOT DOUBLE JEOPARDY OR A BAR TO RETRIAL UNDER 25 U.S.C.A. SECTION 1301(3) OF THE INDIAN CIVIL RIGHTS ACT OF 1968 WHERE THERE IS NO SHOWING OF BAD FAITH CONDUCT ON THE PART OF THE JUDGE OR PROSECUTOR; TRIBAL JUDGES SHOULD REQUIRE REASONS FOR MOTIONS IN WRITING OR ORALLY BEFORE RULING ON THE SANE.

OPINION by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice.

HELD: APPELLANT WILL NOT BE SUBJECTED TO DOUBLE JEOPARDY IN VIOLATION OF 25 U.S.C.A. SECTION 1301(3) OF THE INDIAN CIVIL RIGHTS ACT OF 1968 IN A RETRIAL WHERE THE INITIAL TRIAL WAS COMMENCED AND A LAST-MINUTE MOTION TO DISMISS BY HIS LAY COUNSELOR FOR THE REASON APPELLANT HAD NOT BEEN ARRAIGNED ON THE AMENDED COMPLAINT WAS GRANTED. ALTHOUGH PROCEDURAL ERROR, WITHOUT SHOWING OF BAD FAITH CONDUCT ON THE PART OF THE TRIBAL JUDGE OR PROSECUTOR, A RETRIAL IS NOT BARRED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING WITHIN THIRTY (30) DAYS FROM THE

FILING OF THIS OPINION.

FACTS:

On August 17, 1987, the Tribal Prosecutor Emmett Buckles filed a complaint against Appellant, a delinquent child, for sexual assault under III CCOJ 214. A proper complaint against a delinquent child would have charged a violation of V CCOJ 102(f) which reads, " A child who commits an act which if committed by an adult would be a violation of Title III (Criminal Offenses) of this Code."

The special prosecutor assumed responsibility for handling the case and on January 11, 1988 filed a Motion to Amend Complaint. The motion was approved by Judge Hamilton and the hearing was held January 7, 1988.

At the beginning of the hearing, Lay Counselor Clayton Reum moved for dismissal which was denied by the judge. The prosecution then proceeded to present testimony from two (2) witnesses. After this testimony, Lay Counselor Reum renewed his motion to dismiss the matter based on due process rights in that Appellant was not arraigned on the amended complaint. Judge Hamilton granted Lay Counselor Reum's motion to dismiss without prejudice.

On February 10, 1988, Appellant filed a Petition for Appellate Review stating it is for review of "the final order or judgment of the (sic) Honorable Thomas McAnally entered on the 26th day of January, 1988." The reasons for said appeal were as follows:

> "1. BECAUSE, the lower court has denied motion for dismissal without having answered the issues raised by counsel for defendant."
>
> "2. Petitioner also request a stay of trial proceedings in this matter before this court."

On August 8, 1988, this Court granted the Appellant's petition setting forth the jurisdiction of this Court to review final orders pursuant to I CCOJ 202(a) and appeals in criminal matters pursuant to I CCOJ 205(a). Oral Arguments were heard September 26, 1988. The parties agreed that the issue to be addressed on appeal was basically as follows:

> "Whether Appellant will be subjected to Double Jeopardy in violation of 25 U.S.C.A. Section 1301(3) of the Indian Civil Rights Act of 1968 if a retrial is held where a trial had been commenced and a motion to dismiss was granted because Appellant had not been arraigned on the amended complaint."

This Court will address the above issue and will provide guidance as to the proper handling of this and subsequent matters by tribal judges in similar circumstances.

I.

The Indian Civil Rights Act of 1968 (hereinafter I.C.R.A.) extended certain basic U.S. Constitutional rights to Indians at 25 U.S.C.A. Section 1301, and which will be identified as civil rights herein. The Appellant contends he will be subjected to Double Jeopardy in violation of 25 U.S.C.A. Section 1301(3) if a retrial is held. This section reads,

"No Indian tribe in exercising powers of self-government shall--

"...

"(3) subject any person for the same offense to be twice put in jeopardy.

"...."

There is no case law construing Double Jeopardy and when it attaches under the I.C.R.A., however, there is considerable case law dealing with the Double Jeopardy issue under the Fifth Amendment of the U.S. Constitution. These cases are similar to the instant case. Because the civil rights under 25 U.S.C.A. Section 1301(3) extended to individuals in tribal courts are identical to Fifth Amendment right afforded individuals under the U.S. Constitution, it would be appropriate to apply and/or distinguish the cases referred to above.

Before applying or distinguishing any cases, the facts of this case are important. In the instant case, Appellant's lay counselor made several motions before the hearing which were denied. After the hearing had been commenced and the prosecution had presented testimony from two (2) witnesses, Appellant's lay counselor renewed his motion to dismiss for the reason Appellant had not been arraigned on the new charge. Appellant's lay counselor refused to stipulate to the arraignment of Appellant and allow the hearing to proceed.

The circumstances surrounding the renewing of the motion to dismiss and Appellant's lay counselor's refusal to stipulate to the above in the transcript of the proceedings was as follows:

"Clayton Reum: Before the hearing can be conducted, Your Honor As any hearing can determine whether ... in a hearing where there is evidence that is going to be presented, before that can take place, I believe my client has a right again, as pursuant to the first procedure and the first complaint that was filed. The first step is allow Mark Charette to plead to the complaint. It was agreeable upon my part to allow Ron Arneson to call Dr. Nielson in the interest of time. But it was not my intention or a part of my agreement to deny Mark Charette his due process rights.

"RON ARNESON: Can we proceed to do that, Mr. Reum?

"CLAYTON REUM: You can if you want but it is my objection. I have a motion before the Court for Dismissal. I believe, Your HOnor (sic), to expound on it all the motions that I made this morning are all based on due process. All these motions to come under Mark Charette's due process rights. It makes no difference if my motion that I have submitted to this court is denied again. Because, as I also informed the court in the beginning,at (sic) the end of that hearing, it is our intention to appeal. So I'm basically saying, that whatever happens now is going to explain it. I will have my motion stand as is that this court dismiss these charges. It is the fault of the Prosecution to come into this court unprepared to present his case properly. I believe, this court allows a this hearing to go, Your Honor, that, it is so bad now ... that it is obvious that the Appeals court will not hesitate in dismissing this case. In the interest of time, also and consideration of my client that this court dismiss these charges with prejudice.

"JUDGE HAMILTON: Will you present that to the court in writing?

(OFF THE RECORD)

"JUDGE HAMILTON: Okay! This is just for the record that I'm going to dismiss the complaint against Mark Charette without prejudice. A new trial date will be set up for this and proper procedures will be followed. And if there is a Pre—Trial Conference that is going to be requested by either side, it will be done ahead of time and not on the Trial date. And also if there is any motions that is going to be presented to the Court, it will be made in writing and presented to me before the Trial. Court is adjourned."

The facts in Lovato vs. New Mexico, 242 U.S. 199, 37 S.Ct. 107 (1916), are comparable with those in the instant case. In Lovato, the following took place:

"In the district court of the territory of New Mexico the accused, on May 9th, 1910, pleaded not guilty to an indictment for murder. On May 24, 1911, without withdrawing his plea, he demurred to the indictment on the ground that it charged no offense. The demurrer was overruled, and, both parties announcing themselves ready for trial, a jury was impaneled and sworn and the witnesses for both sides were called and sworn. The record than states: "'That thereupon it appearing to E.C. Abbot, Esq., district attorney, that defendant had not been arraigned and had not plead since the overruling of defendant's demurrer, upon motion the court dismissed the jury and directed that the defendant be arraigned and plead.'" The accused was accordingly again at once arraigned and pleaded not guilty, and, both sides again announcing themselves ready for trial, the same jury previously impaneled was sworn and the trial proceeded. At the close of the evidence for the prosecution the defendant moved for a directed verdict on the ground, among others, that the record showed that he had been formerly placed in jeopardy for the same offense, since it appeared that in the same case a jury had been impaneled and sworn and thereafter had been dismissed from a consideration of the case. The motion was denied and a conviction of manslaughter followed. The same ground was relied upon in a motion in arrest of judgment which was denied, and from the judgment and sentence subsequently entered an appeal was prosecuted to the supreme court of the territory." Id. 37 S.Ct. at 108.

In Lovato, the defendant was not arraigned and the jury had been impaneled and sworn and the witnesses for both sides had been called and sworn. The district attorney brought it to the attention of the Court that defendant had not been arraigned and the court dismissed the jury and arraigned the defendant. Both sides announced themselves ready for trial and proceeded.

There are three (3) distinguishable facts in the instant case with Lovato. First, the lay counselor would not stipulate to the arraignment of the defendant and proceeding with the hearing. Second, defendant was being tried by a jury. Finally, defendant was found guilty of the offense charged.

In Lovato, on appeal defendant contended he was placed in Double Jeopardy for the same offense. The U.S. Supreme Court did not agree and stated:

> "Without expressing any opinion as to the correctness of the ruling of the court below concerning the failure to promptly raise the question of former jeopardy, although on this record it may be conceded it presents a Federal question, we pass from its consideration, since we think the contention that the accused was twice put in jeopardy is wholly without merit. Under the circumstances there was, in the best possible view for the accused, a mere irregularity of procedure which deprived him of no right. Indeed, when it is borne in mind that the situation upon which the court acted resulted from entertaining a demurrer to the indictment after a plea of not guilty had been entered and not withdrawn, it is apparent that the confusion was brought about by an overcautious purpose on the part of the court to protect the rights of the accused. Whether or not, under the circumstances, it was a necessary formality to dismiss the jury in order to enable the accused to be again arraigned and plead, the action taken was clearly within the bounds of sound judicial discretion. United States v. Peruz, 9 Wheat. 579, 580, 6 L. ed. 165, 166; Drever v. Illinois, 187 U. 5. 71, 85, 86, 47 L. ed 79, 86, 23 Sup. Ct. Rep. 28, 15 Am. Crime. Rep. 253. See United States v. Riley, 5 Blatchf. 204, Fed. Cas. No. 16,164, in which the facts were in substance identical with those here presented." Id. 37 S.Ct. at 108.

As in Lovato where the Supreme Court upheld the conviction of the defendant and found that the circumstances were an irregularity of procedure which deprived him of no right. This Court has gone to great lengths to preserve and protect the rights of defendants, however, the circumstances of this case in the best possible view for the Appellant also demonstrates a mere irregularity of procedure at the January 7, 1988 hearing which deprived him of no right. Furthermore, the tribal judge was overcautious in granting Appellant's motion to dismiss since she could have ordered the parties to proceed if she determined no new or additional offense were charged. This will be discussed in more detail below.

The more recent case of U.S. vs. Dinitz, 424 U.S. 611, 96 S.Ct. 1075 (1976) is further support for the above. At the first trial in Dintz, the jury had been selected and sworn. Because of improper statements by defense counsel, a mistrial was declared so that the defendant could retain other counsel. Before the second trial, the defendant moved to dismiss the indictment on the ground that a retrial would violate the Double Jeopardy Clause. The Court stated:

> "The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.
>
> See United States v. Wilson, 420 U.S. 332, 343, 95 S.Ct. 1013, 1021, 43 L.Ed.2d 232, *241;* North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664. Underlying this constitutional safeguard is the belief that "'the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'" Green v. United States, 335 U.S. 184, 187—188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199, 204." Id. at 96 S. Ct. at 1079.

Under the circumstances in Dinitz, the Supreme Court did not find that a retrial violated the defendant's constitutional right not to be twice put in jeopardy. Under the circumstances herein, a retrial would not violate Appellant's civil right not to be twice put in jeopardy.

In Dinitz, the Supreme Court discussed circumstances where conduct by a judge or prosecutor would constitute Double Jeopardy. This Supreme Court stated,

> "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "'bad— faith conduct by judge or prosecutor, "'United States vs. Jorn, supra, 400 U.S., at 485, 91 S.Ct., at 557, threatens the "'[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict"' the defendant. Downum vs. United States, 372 U.S.. at 736, 83 S.Ct., at 1034, 10 L.Ed.2d, at 102. See Gori v.United States, 367 U.S., at 369, 81 S.Ct., at 1526,6 L.Ed.2d 905; United States vs. Jorn, supra, 400 U.S. at 489, 91 S. Ct., at 559, 27 L.Ed.2d at 558 (Stewart, J., dissenting); Cf. Wade v. Hunter, 336 U.S. at 692, 69 S.Ct., at 838, 93 L.Ed., at 979. Id. 96 S.Ct. at 1081.

In applying the above to the instant case, it does not appear from the record nor has Appellant alleged that the tribal judge's actions or the prosecutor's actions were intended to provoke Appellant's motion to dismiss and thereby subject him to substantial burdens imposed by multiple prosecutions. The prosecutor actually requested Appellant's lay counselor to allow Appellant to be arraigned and the hearing to continue and at lay counselor's insistence the motion to dismiss was granted without prejudice and the hearing continued. Without allegations and evidence of bad faith conduct by the tribal judge or prosecutor, a retrial of Appellant is not barred.

Another case, Lee v. United States, 432 U.S. 23, 97 S.Ct. 2141 (1977), raises the issue of a judge's conduct as a bar to retrial and will provide guidance to tribal judges. In Lee, at the first trial the district court heard the evidence and granted petitioner's motion to dismiss the information for failure to provide adequate notice of the crime charged. Petitioner was retried and convicted. The defendant contended the second trial violated the Double Jeopardy Clause. The prosecution argued the defendant was to blame for the second trial.

The Court agreed with the prosecution in the following:

> "In urging that his second trial was barred by the Double Jeopardy Clause, petitioner directs his principal arguments to the conduct of the first Proceeding. He contends "'(i) that he should never had to undergo the first trial because the Court was made aware of the defective information before Jeopardy had attached; and (ii) that once the court had determined to hear evidence despite the defective charge, he was entitled to have the trial proceed to a formal finding of guilt or innocence. The Government responds that petitioner had only himself to blame in both respects. By the last-minute timing of his motion to dismiss, he virtually assured the attachment of jeopardy; and by failing to withdraw the motion after Jeopardy had attached, he virtually invited the court to interrupt the Proceedings before formalizing a finding on the merits. We think that the Government has the better of the argument on both Points under the Principles explained in our decision in United States v. Dinitz 424 U.s. 600; 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).'. Id. 97 S.Ct. at 2144.

Appellant's contentions are quite similar to those of the defendant in Lee. Appellant contends that he will be Placed in

Double Jeopardy if a retrial is held after the prosecution called two (2) witnesses. Appellant does not specifically contend in any of the Pleadings filed with the tribal court prior to or at the start of the January 7, 1988 hearing that he was not arraigned on the original and amended complaint.

As in Lee, it would appear that Appellant has only himself to blame for not having been arraigned prior to the testimony of the two (2) witnesses by the last-minute timing of his motion to dismiss This Court would also follow the Position of the Court in Lee in finding that a retrial of Appellant on the charges on the amended complaint is not barred by 25 U.S.C.A Section 1301 (3).

As guidance to tribal judges in future cases with similar circumstances, during trials and hearings tribal judges should require that attorneys and lay counselors specifically set forth all reasons for their motions in writing and/or orally before ruling on the same. When ruling, tribal judges should clearly set forth their reasons for granting or denying the motion.

Where an amended complaint has been filed, the tribal judge should complete the arraignment prior to the date of the proceeding or at least before the jury selection or presentation of any testimony. If the defendant is arraigned on the date of the hearing and prior to the presentation of any testimony, the judge should first determine if a new or different offense is charged and defendant needs additional time to prepare. If no new or different offense is charged, the judge should ask the prosecutor and attorney or lay counselor if they are prepared to proceed and if either indicates they are not, then they should be required to state their reasons.

In any event, it is the position of this Court that irregularities in the procedures set forth above to guide tribal judges will not necessarily bar retrials unless there is clear and convincing evidence of bad faith conduct by the tribal judge or prosecutor.

THEREFORE, APPELLANT WILL NOT BE SUBJECTED TO DOUBLE JEOPARDY IN VIOLATION OF 25 U.S.C.A. SECTION 1301(3) OF THE INDIAN CIVIL RIGHTS ACT OF 1968 AT A RETRIAL WHERE THE INITIAL TRIAL WAS COMMENCED AND A LAST-MINUTE MOTION TO DISMISS BY LAY COUNSELOR FOR THE REASON APPELLANT HAD NOT BEEN ARRAIGNED ON THE AMENDED COMPLAINT WAS GRANTED. ALTHOUGH THERE WAS PROCEDURAL ERROR, WITHOUT SHOWING BAD FAITH CONDUCT ON THE PART OF THE TRIBAL JUDGE OR PROSECUTOR, A RETRIAL IS NOT BARRED. THIS MATTER IS HEREBY REMANDED TO TRIBAL COURT FOR A HEARING ON THE MERITS OF THE CASE WITHIN THIRTY (30) DAYS OF THE FILING OF THIS OPINION.

DATED this _____ day of February, 1989.

BY THE COURT OF APPEALS:

_____
Arnie A. Hove, Chief Justice

_____
Gary James Melbourne, Associate Justice