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

FORT PECK ASSINIBOINE SIOUX TRIBES,
Plaintiff/Appellee,

vs.

Appeal No. 055

STACEY LILLEY,
Defendant/Appellant.

THIS APPEAL is from the Fort Peck Tribal Court, Assiniboiné and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable Judge Violet E. Hamilton presided.

FOR APPELLANT: Carson Walking Eagle, Lay Counselor, Box 1352, Poplar, Montana 59255.

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

Argued September 16, 1988; Decided September 16, 1988.

CRIMINAL: APPELLANT DEPRIVED OF LIBERTY WITHOUT REQUIRED HEARING UNDER I CCOJ 602(b); TRIBAL JUDGE MUST DISQUALIFY SELF PURSUANT TO I CCOJ 307 WHEN HAVING PERSONAL KNOWLEDGE OF DISPUTED FACTS; AND TWO JUSTICES MAY HEAR ARGUMENTS AND RENDER DECISIONS.

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

HELD: APPELLANT WAS DEPRIVED OF HER LIBERTY FOR AN ALLEGED VIOLATION OF II CCOJ 602(B) WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF HER RIGHTS UNDER THE ICRA AND THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING IN ACCORDANCE WITH THIS OPINION. THE HEARING IS TO BE HELD WITHIN THIRTY (30) DAYS FROM THE FILING OF THIS OPINION AND SERVICE UPON THE TRIBAL COURT. THE HONORABLE JUDGE VIOLET HAMILTON IS DISQUALIFIED FROM HEARING THIS MATTER PURSUANT TO I CCOJ 307 IN THAT SHE HAS PERSONAL KNOWLEDGE OF DISPUTED FACTS.

On June 19, 1988, Appellant was allegedly observed by Honorable Judge Violet E. Hamilton "staggering" into "Arlos' Bar" at about 10:30 p.m. On June 20, 1988, Judge Hamilton signed a Warrant to Apprehend and Order to Show Cause on

Appellant for violation's of probation under II CCOJ 602(b).

On June 21, 1988, Appellant was arrested. At a meeting at about 11:00 a.m. in the prosecutor's office, Emmett Buckles, Tribal Prosecutor, would not disclose to Appellant's counsel the identity of the "reliable witness". The prosecutor also refused to give Appellant's counsel a copy of the affidavit from the reliable witness. The Appellant and her lay counselor wanted to confront the witness in open court. The Appellant had witnesses present to testify that she had not violated the conditions of her probation.

A hearing was held at 3:55 p.m. in Judge Hamilton's chambers. Present were Emmett Buckles, Appellant, her lay counselor, Rose Lilley, Appellant's mother, Willard Miller, Acting Director Spotted Bull Treatment Center Out-Patient Program, Danna Clark, Sarah Morey, BIA Police Officer. Judge Hamilton ordered Appellant's witnesses to leave the room.

The Tribal Prosecutor then informed Judge Hamilton of an agreement where Appellant would be given five (5) days flat, thirty-one (31) days in the Spotted Bull Treatment Center, with ten (10) months follow-up. Appellant's lay counselor objected to this and indicated there had been no such agreement. Judge Hamilton stated she would follow the prosecutor's recommendation and informed the lay counselor she was the reliable witness. Judge Hamilton concluded the hearing and allowed no favorable testimony to be given by Appellant's witnesses.

Appellant presented the following issues on appeal:

WHETHER THE DEFENDANT'S RIGHTS UNDER THE INDIAN CIVIL RIGHTS ACT AND THE FORT PECK COMPREHENSIVE CODE OF JUSTICE WERE VIOLATED WHEN SHE WAS SENTENCED TO SERVE 5 DAYS IN TRIBAL JAIL, 31 DAYS AT THE SPOTTED BULL TREATMENT CENTER AND 10 MONTHS FOLLOW-UP, FOR AN ORDER TO SHOW CAUSE CONTEMPT.

WHETHER JUDGE HAMILTON SHOULD HAVE VOLUNTARILY REMOVED HERSELF FROM THE CASE BECAUSE SHE WAS A WITNESS AND PURSUANT TO I CCOJ 307.

Before addressing Appellant's issues, this Court will again discuss whether two justices can hear this matter.

I.

The following was discussed in [Tribes vs. Onstad](#), Appeal No. 056 (September 16, 1988). This Court is to be composed of one chief justice and two associate justices. Title I CCOJ 203 sets forth the composition of the Court of Appeals and reads,

"The Tribal Executive Board shall appoint a Chief Justice and two associate justices, none of whom shall be Judges of the Tribal Court."

On September 8, 1988, an associate justice was suspended by this Court until the Tribal Executive Board held a hearing on its Memorandum containing specific charges for his removal pursuant to I CCOJ 306(a). This suspension in effect disqualified the associate justice from hearing scheduled appeals.

This appeal, as well as several others, have been scheduled for oral argument for several weeks or months and upon

suspension of the associate justice, a request had been made of the Tribal Court Administrator and Tribal Executive Board for appointment of a substitute justice. Rule 11 of the Rules of Appellate Procedure deals with the appointment of a substitute justice, however, the rule only applies in a disqualification of a justice based on a challenge of impartiality by a party. Rule 11 reads,

"If any party to a case challenges the impartiality of a Justice, and the Justice does not disqualify himself, the Chief Justice may determine that the Justice should nonetheless be disqualified. In the event of disqualification, a substitute Justice may be appointed for that case by the Tribal Executive Board, or by the Court (using a random selection procedure) from a list of substitute Justices approved in advance by the Tribal Executive Board."

Title I CCOJ 307 also deals with the disqualification of a justice or judge based on impartiality and reads,

"A justice or judge shall be disqualified in any proceeding in which his or her impartiality might reasonable be questioned, in which he or she has any personal bias or prejudice concerning any party, in which he or she or a member of his or her immediate family might be a witness, has any interest, or has any personal knowledge of any disputed proceeding, or has acted or is acting as a lawyer or lay counselor in the proceeding, or in which he or she might otherwise appear to be biased or prejudiced. The Chief Judge must determine all disqualifications in the Tribal Court. As used in this section, immediate family shall include spouses, grandparents, parents, children, grandchildren, brothers, sisters and in-laws."

None of the Rules of Appellate Procedure or CCOJ specifically require that three justices hear all appeals. At the time of oral arguments no substitute justice was appointed by the Tribal Executive Board and no list was made available to this Court for a random selection of a justice. Rule 1 of the Rules of Appellate Procedure reads,

"In the interests of justice, or of expediting decision on any matter before it, or for other good cause, the Court may except as provided in Rule 3, waive, alter or suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction."

Because there is no specific requirement that three justices hear an appeal, this Court will guide itself by Rule 1 of the Rules of Appellate Procedure.

It is the position of this Court that two justices may hear oral arguments and render decisions in this matter. It is in the interest of justice or of expediting decision that oral arguments not be delayed herein. Before proceeding with oral argument and waiving, altering or suspending the rules on the appointment of a substitute justice, the parties were asked to stipulate to only two justices hearing this matter and rendering a decision. The parties so stipulated.

II.

In answering Appellant's first issue, Appellant's rights under the ICRA were violated. Appellant was not given adequate notice of the charges against her; opportunity to present a defense; confront the witnesses against her; and therefore was denied due process.

This Court has received the tribal court file which did not contain a transcript or recording of the hearing held on the probation violation. The lack of a transcript or recording makes it extremely difficult for this Court to review any matter on appeal and determine if there is a violation of an individual's rights, however, this Court will address each right hereinabove set forth based on the tribal court file.

As for the right to adequate notice, a violation of this right was not raised, however, on June 20, 1988, an Order to Show Cause was issued to Appellant to appear on June 21, 1988 at 10:00 am. and show cause why she should not be punished for contempt for violating conditions of a previous court order of probation. Appellant was arrested on June 21, 1988 and made to appear for a hearing on that date.

Title II CCOJ 602(b) governs hearings on violations of conditions of probation. This section reads,

"If any person violates the terms and conditions of probation, the Court may, after giving him notice and the opportunity for a hearing in open court, revoke or alter the terms of his probation, and may, as a penalty for violation of the probation, impose an additional fine or imprisonment."

This section does not give a specific time requirement for the notice. However, the same day notice on the Order to Show Cause was not adequate notice under II CCOJ 602(b). In scheduling a hearing under II CCOJ 602(b), defendants should be given at least a five (5) working day notice unless otherwise specifically required under the CCOJ. A shorter time is not adequate notice.

Although Appellant had an opportunity to obtain legal counsel, no time was given to the lay counselor to prepare a defense. Lay counselor's claims that Appellant had no opportunity to present a defense and confront witness against her was uncontested by the Tribal Prosecutor and without a transcript or recording this Court has no choice but to find for Appellant.

As discussed in Tribes vs. Onstad, a transcript or recording of this type of hearing is important and to be made available to parties herein and this Court in the event of an appeal. A transcript or recording is also vital to insuring that tribal courts are protecting an individual's rights. When a transcript or recording does not exist, every step will be taken by this Court to insure that an individual is afforded their rights under the ICRA which will include remanding the matter to Tribal Court for a new hearing or trial. This Court will direct tribal court judges, prosecutors and clerks to handle probation violations under II CCOJ 602(b) as directed in Tribes vs. Onstad.

Because of the allegations of Appellant and lack of a transcript or recording, this Court finds for the Appellant. Therefore, Appellant was deprived of her liberty for an alleged violation of II CCOJ 602(b) without due process of law and in violation of her rights under the ICRA and this matter is remanded to Tribal Court for a hearing in accordance with this opinion.

III.

In addressing Appellant's second issue, Judge Hamilton should have disqualified herself pursuant to I CCOJ 307 which has been set out in full above. Judge Hamilton had personal knowledge of disputed facts and should have voluntarily disqualified herself from acting as the judge at Appellant's hearing on violations of probation. In the event Judge Hamilton refused as in this matter, Appellant's lay counselor should have requested a continuance and petitioned the Chief Judge to determine whether Judge Hamilton should be disqualified because she was a witness in the matter.

Therefore, Judge Hamilton is disqualified, pursuant to I CCOJ 307, from hearing this matter at the subsequent hearing.

APPELLANT WAS DEPRIVED OF HER LIBERTY FOR AN ALLEGED VIOLATION OF II CCOJ 602(B) WITHOUT DUE PROCESS OF LAW AND IN VIOLATION OF HER RIGHTS UNDER THE ICRA AND THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING IN ACCORDANCE WITH THIS OPINION. THE HEARING IS TO BE HELD WITHIN THIRTY (30) DAYS FROM THE FILING OF THIS OPINION AND SERVICE UPON THE TRIBAL COURT. THE HONORABLE JUDGE VIOLET HAMILTON IS DISQUALIFIED FROM HEARING THIS MATTER PURSUANT TO I CCOJ 307 IN THAT SHE HAS PERSONAL KNOWLEDGE OF DISPUTED FACTS.

DONE this _____ day of November, 1988.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Justice
