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

FORT PECK ASSINIBOINE AND SIOUX TRIBES,
Plaintiff/Appellee,

vs.

Appeal No. 056

GERALD ONSTAD,
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: Mary L. Zemyan, Attorney at Law, P. O. Box 1094, Wolf Point, Montana 99201.

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

CRIMINAL: FAILURE TO A) HOLD HEARING IN OPEN COURT PURSUANT TO II CCOJ 602(b), B) GIVE ADEQUATE NOTICE, C) ADVISE OF RIGHT TO OBTAIN LEGAL COUNSEL, D) ALLOW TO PRESENT DEFENSE AND E) CONFRONT WITNESSES ARE VIOLATIONS OF ICRA; PROCEEDINGS MUST BE RECORDED; AND TWO JUSTICES MAY HEAR ARGUMENTS AND RENDER DECISIONS.

ARGUED: SEPTEMBER 16, 1988. DECIDED: SEPTEMBER 16, 1988.

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

APPELLANT WAS DENIED DUE PROCESS AND APPELLANT'S RIGHTS UNDER THE ICRA WERE VIOLATED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING IN ACCORDANCE WITH THIS OPINION. THE HEARING SHALL BE HELD WITHIN THIRTY (30) DAYS FROM THE DATE OF THE FILING OF THIS OPINION AND NOTICE OF THE SAME TO THE TRIBAL COURT. IN THE EVENT APPELLANT IS FOUND TO HAVE VIOLATED THE CONDITIONS OF HIS PREVIOUS PROBATION, THE TRIBAL COURT IS ORDERED TO GIVE APPELLANT 12 DAYS CREDIT FOR TIME SERVED.

On May 5, 1988, Appellant was found guilty of having violated III CCOJ 304, Theft, and III CCOJ 413, Disorderly Conduct. Appellant was sentenced to serve 50 days flat at the tribal jail and 30 days at Spotted Bull Treatment Center.

On May 24, 1988, Appellant was released from tribal jail and placed on probation for the remaining 31 days of his original sentence. No written order was signed by Judge Hamilton. No written probation agreement was signed by the defendant.

On June 2, 1988, Judge Hamilton issued an order directing the Appellant to show cause why he should not be found guilty of contempt for failure to comply with the unwritten order of May 24, 1988.

On June 15, 1988, Appellant was arrested pursuant to a Warrant to Apprehend issued by Judge Hamilton. On June 17, 1988, Appellant was ordered to serve 90 days flat on the Order to Show Cause Contempt. On June 29, 1988, Judge Hamilton released Appellant from tribal jail, based on his appeal of the June 17, 1988 order.

Appellant presented the following issue on appeal:

WHETHER THE DEFENDANT' S RIGHTS UNDER THE INDIAN CIVIL RIGHTS ACT AND THE FORT PECK COMPREHENSIVE CODE OF JUSTICE WERE VIOLATED WHEN HE WAS SENTENCED TO SERVE 90 DAYS IN JAIL FOR SHOW CAUSE CONTEMPT IN VIOLATION OF CHAPTER H (sic).

This Court will also address the issue of whether two Justices can proceed and hear oral arguments by its own order or by stipulation of the parties. Before addressing Appellant's issue, this Court will address its own issue in the following.

I.

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 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. 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 argument 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.

Therefore, it is the position of this Court that two justices may hear oral argument and render a decision 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 issue, Appellant's rights under the ICRA were violated. Appellant's ICRA rights he felt were violated were as follows:

- a. Adequate notice of the charges against him;
- b. Opportunity to obtain legal counsel;
- c. Opportunity to present a defense;
- d. Confront the witnesses against him;
- c. Due process of law.

The discussion below will address Appellant's allegations and whether the file and transcript or recording- reflects and supports the Appellant's allegations of violations of ICRA rights.

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 Appellant was denied due process or there is a violation of his individual ICRA rights. This Court will still address each right set forth herein based on the tribal court file.

As for the right to adequate notice, on June 2, 1988, an Order to Show Cause was issued to Appellant to appear on June 3, 1988 at 10:00 a.m. and show cause why he should not be punished for contempt for violating- conditions of a previous court order of probation. Appellant was arrested on June 15, 1988 and sentenced on June 17, 1988 on that order to show cause.

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 one day notice on the Order to Show Cause was not adequate notice under II CCOJ 602(b). Appellant was denied due process and his ICRA rights were violated. 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 and a shorter time is not adequate notice.

As for the right to obtain legal counsel, this Court can not determine whether Appellant was given an opportunity to obtain legal counsel. In addition, this Court can not determine whether Appellant was given an opportunity to present a defense and confront witness against him. As discussed above, there exists no transcript or recording of the proceedings. A transcript or recording of a probation violation hearing is important and to be made available to the parties and this Court in the event of an appeal. A transcript or recording is also vital to insuring that tribal courts are affording individuals due process and protecting an individual's ICRA rights.

Because of the allegations of Appellant and lack of a transcript or recording, this Court will have to find that Appellant was not advised of his right to legal counsel or given an opportunity to obtain the same. In addition, this Court will have to find that Appellant was not given an opportunity to present a defense or confront witnesses against him.

Therefore, Appellant was deprived of his liberty for an alleged violation of II CCOJ 602(b) without due process of law and in violation of his rights under the ICRA. Before leaving this issue, the Court will discuss the procedure presently used by the tribal judges, prosecutors and clerks in handling probation violations under II CCOJ 602(b) and give some direction as to proper procedure.

First, the Appellant was never properly charged with a probation violation under II CCOJ 602(b). Upon being made aware of a probation violation, the tribal prosecutor should have filed with the tribal court a petition for revocation of probation and attached thereto affidavits or police or probation reports in support of the same. The petition should have requested that an order to show cause be issued from the tribal court directing the defendant appear for a hearing in open court at least five working days from the date of the order. The petition should have advised the defendant of the following: a) his right to have legal counsel present at his own expense; b) his right to present witnesses and evidence in his defense; and c) his right to

confront the witnesses against him.

Second, the tribal prosecutor should see that a copy of the order and petition is served upon the defendant at least five working days before the hearing and a record of such service be placed in the tribal court file. In the event of defendant's failure to appear, a warrant of apprehension or arrest should be issued by the tribal judge. Upon the defendant's voluntary appearance or apprehension or arrest, a hearing in open court should be held wherein the defendant is again advised of his rights under the ICRA and on the petition and the same recorded. If the defendant has been given the required notice and waives these rights on the record, the tribal court may proceed with the hearing.

During this hearing, Appellant should be afforded the opportunity to confront witnesses against him and present witnesses in his defense. Tribal judges and prosecutors are directed to see that probation violation hearings pursuant to TI CCOJ 602(b) are handled properly and as directed herein.

A final note, tribal prosecutors are responsible for preparing the proper documentation to bring probation violators before the tribal court. Tribal prosecutors should also take responsibility for seeing that recordings are being made of the proceedings to demonstrate an individual's ICRA rights have been protected. Finally, tribal court clerks are to see that these documents and records are kept as a permanent part of the tribal court's file and preserved for appeal or etc.

APPELLANT WAS DENIED DUE PROCESS AND APPELLANT' S RIGHTS UNDER THE ICRA WERE VIOLATED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A HEARING IN ACCORDANCE WITH THIS OPINION. THE HEARING SHALL BE HELD WITHIN THIRTY (30) DAYS FROM THE DATE OF THE FILING OF THIS OPINION AND NOTICE OF THE SAME TO THE TRIBAL COURT. IN THE EVENT APPELLANT IS FOUND TO HAVE VIOLATED THE CONDITIONS OF HIS PREVIOUS PROBATION, THE TRIBAL COURT IS ORDERED TO GIVE APPELLANT 12 DAYS CREDIT FOR TIME SERVED.

DONE this ____ of November, 1988.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Justice
