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

vs. **Appeal No. 062**

MARVIN BULL CHIEF SR.,
Appellant/Respondent,

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

FOR APPELLEE: Ron Arneson, Special Prosecutor, P. 0. Box 1133, Wolf Point, Montana 59201.

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

Argued: April 7, 1989. Decided: April 7, 1989.

CRIMINAL: APPELLANT KNOWINGLY WAIVED HIS RIGHT TO RETAIN LEGAL COUNSEL; APPELLANT HAS NO RIGHT TO COURT APPOINTED COUNSEL UNDER THE CCOJ OR ICRA; IT WAS HARMLESS ERROR TO FAIL TO ADVISE APPELLANT OF THE MAXIMUM AUTHORIZED PENALTY PURSUANT TO II CCOJ 401(c) (2); AND APPELLANT'S ICRA RIGHTS WERE NOT VIOLATED BY TIE IMPOSITION OF A SENTENCE OF FIVE (5) YEARS, ONE (1) YEAR ON EACH COUNT, TO BE SERVED CONSECUTIVELY AND BEING ORDERED TO PAY $10, 000.00 RESTITUTION.

OPINION delivered by Arnie A. Hove, Chief Justice, joined by Gary James Melbourne, Associate Justice, and Floyd Azure, Associate Justice.

HELD: THE APPELLANT UNDERSTOOD THE NATURE OF THE PROCEEDINGS AND HIS RIGHTS AND HIS SENTENCE IS AFFIRMED AND HE IS HEREBY ORDERED TO BEGIN SERVING THE SAME IMMEDIATELY.

FACTS

On October 12, 1988, Appellant was charged by criminal complaint with committing the offense of Aggravated Sexual

Assault of a Child, five counts, in violation of III CCOJ 214(a). On or about October 7, 1988, Appellant was alleged to have had sexual intercourse with a child, step—daughter, under 18 years of age who was in the Appellant's care. On that date, Appellant was alleged to have had sexual intercourse twice. It was further alleged Appellant had intercourse with this step-daughter once or twice each week since she was eight years old. The complaint was signed by the juvenile and Appellant's sister-in-law.

On October 12, 1988, Appellant was apprehended for the above described offenses. On October 12, 1988, Appellant signed a Waiver of Rights which was witnessed by a law officer, Robert Daniels (See Exhibit A). The Waiver of Rights advised Appellant of the following rights:

> "1. You have the right to remain silent.
>
> "2. Any statements made by you can be used against you in a Court of law.
>
> "3. You have the right to obtain counsel at your own expense.
>
> "4. You have the right to make at least one (1) complete telephone call to a friend and at least one (1) completed telephone call to a Lay Counselor or Attorney, immediately after being registered and identified at the jail, or sooner, if there is an unreasonable delay in taking the accused to jail or in processing at the jail."

Appellant signed the following:

> "I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a Lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me."

On October 13, 1988, Appellant entered a plea of guilty to the offense of Aggravated Sexual Assault, five counts, and sentencing was set for October 28, 1988. On October 28, 1988, Appellant received five (5) years in jail, one (1) year on each count, and $10,000.00 for restitution.

On November 10, 1988, Appellant's Lay Counselor filed a Motion for Review, Stay of Execution of Sentence Pending Appeal. The issues set forth were as follows:

> "I. The defendent (sic) was not adequatly (sic) provided with legal counsel. And did he have the right to court appointed counsel.
>
> "II. Was there real or physical evidence to substantiate a conviction.
>
> "III. If there was evidence to charge the defendent (sic) with five felony counts, or whether the defendent (sic) should have only been charged with misdemeanor violations.
>
> "IV. Was the defendent (sic) rights violated by not bieng (sic) able to change his plea and

request a jury trial.

"V. The court was negligent in performing a pre-sentence investigation.

"VI. The sentence exceeds by far similar previous cases from the same court, and does not conform to equality and the principles of substantial uniformity."

On March 16, 1989, this Court granted Appellant's Order Granting Appeal and Setting Date and Time for Oral Arguments. Although the appeal was beyond the fifteen (15) days, the Court granted the same as a matter of right pursuant to I CCOJ 205 (a) and because the issues raised by Appellant indicated possible irregularities in the Tribal Court proceedings and violations of Appellant's rights under CCOJ and Indian Civil Rights Act (hereinafter ICRA). Oral arguments were held on April 7, 1989 at the Tribal Court Building in Poplar, Montana.

I. WHETHER APPELLANT WAS NOT ADEQUATELY PROVIDED WITH LEGAL COUNSEL AND DENIED THE RIGHT TO COURT APPOINTED COUNSEL.

The CCOJ and ICRA do not require that the Tribes provide a defendant in Tribal Court with legal counsel. In Tom vs. Sutton, (1976, CA9 Wash) 533 F.2d 1101, Petitioner seeking writ of habeas corpus on ground that he has right to appointed counsel in criminal proceeding before tribal court was denied writ since Indian Civil Rights Act (25 USC Section 1302) did not guarantee such right and since constitution adopted by petitioner's particular tribe clearly did not intend to provide counsel for indigent defendants.

Because the CCOJ and ICRA does not require the Tribes to provide defendants in Tribal Court with court appointed legal counsel, Appellant's issue is without merit. Further, Appellant did retain his own lay counselors who represented him at the sentencing hearing on October 28, 1988 and oral arguments April 7, 1989, and therefore, the Appellant's issue is also moot. This would be sufficient to address the above issue except Appellant's counsel raised a new issue during oral arguments.

The issue raised by Appellant's lay counselor at oral arguments was whether Appellant understood the nature of the proceedings. While addressing the issue of whether Appellant understood the nature of the proceedings, this Court will be determining whether the Tribal Court adequately afforded Appellant his rights under the CCOJ and ICRA.

Title II CCOJ 203 sets forth the rights which a defendant must be advised of immediately upon his arrest. On October 12, 1988, the date of Appellant's apprehension, the facts show that he was given a written statement of the rights required by II CCOJ 203 and waived the same which was witnessed by a law officer (See Exhibit A).

In addition to the rights required by the CCOJ at II CCOJ 203, there are rights to be afforded an individual under the ICRA at 25 USC Section 1302(6) and II CCOJ 401 at the time of arraignment. The rights to be afforded an individual under 25 USC Section 1302(6) read as follows:

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

"...

"(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses

against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

"...."

At the time of arrest October, 12, 1988, and again at arraignment October 13, 1988, Appellant was informed of his right to have the assistance of counsel for his defense. On October 13, 1988, Appellant was informed or advised of his rights to a speedy and public trial, of the nature and cause of the accusation, to be confronted with the witnesses against him, and to have compulsory process for obtaining witnesses in his favor. Therefore, Appellant was adequately afforded his rights under II CCOJ 203 and 25 USC Section 1302(6).

The rights in 25 USC Section 1302 are also set out in II CCOJ 401(c)(l) and (2). Title II CCOJ 401 is the arraignment section of the CCOJ and sets forth the arraignment procedure. This section requires that before a defendant is required to enter a plea a judge shall read the complaint and the section of the tribal code which he is charged with violating and determine whether the accused understands. The applicable part of II CCOJ 401 reads,

"...

"(c) Before and accused is required to plead to any criminal charges the Judge shall:

"(1) Read the complaint to the accused and determine that he understands the complaint and the section of the tribal code which he is charged with violating, including the maximum authorized penalty; and

"(2) Advise the accused that he has the right (a) to remain silent, (b) to have a speedy and public trial where he will be confronted with witnesses against him after he has had sufficient time to prepare his defense if he pleads "not guilty," (c) to be tried by a jury if the offense charged is punishable by imprisonment, and (d) to be represented by counsel at his own expense, before he pleads to the charge.

"...."

In the arraignment proceedings, the Appellant was read the complaint, the section of the tribal code which he is charged with violating and rights set forth in II CCOJ 401(c) (2). Appellant was not read the maximum authorized penalty, however, he was informed he was charged with a felony.

Although Appellant was not advised of the maximum authorized penalty at arraignment, in his argument, lay counselor stated the key issue was whether the tribal judge performed her duty to determine that Appellant's ability to understand the complaint and nature of the proceedings and this Court agreed. Lay counselor's argument and this Court's agreement therewith went as follows:

Clayton Reum:	In one, it says, "'the accused, during the arraignment, you read the complaint to the accused and determine that he understands the complaint and the section of the Tribal Codes that he is charged with violating, including the maximum penalty,"' which is absent from this. Also in paragraph (d), "'the Judge should determine wheter (sic) or not there is probable cause to believe that an offense against Tribal law was committed"' which was an issue that was not determined.
Justice Hove:	One moment, what you are saying in the transcript, some part ... Okay! Section 401(c) (1), the last part there that you are sup pose to advise him of t e maximum penalty?
Clayton Reum:	The key issue here, Your Honor, I believe is that you determine that he understands.
Justice Hove:	Oh! Yes!
Clayton Reum:	It's not so much, whether or not, the Court advised him, but to determine whether ot (sic) not, that he understood and since there is no . . . there was no pre—sentence investigation, there was none before the trial and no past history was presented to the Court after he entered a plea. There was no determination of that whether he understood that complaint or the maximum penalty."

(Oral Argument Transcript p. ii, L. 19-25 and p. 12, L. 1.18.)

The tribal judge determined the Appellant understood the complaint and section of the tribal code which he was charged with violating and then asked the Appellant to enter a plea. Appellant entered a plea of guilty which was accepted and a sentencing date was set. The dialogue between the tribal judge and Appellant was as follows:

Judge Hamilton:	. . . "Fort Peck Assiniboine and Sioux Tribes, Plaintiff-versus-Marvin Bull Chief Sr., Defendant, you hereby charged by this complaint with committing the offense of Aggravated Sexual Assault of a Child, five (5) counts, which is in violation of Title III, Section 214 a Fort Peck Tribal Code of Justice, to wit: Said Defendant did on or about the 7th day of October, 1988, in the Fort Peck TRibal Jurisdiciton (sic): The Defenant (sic) had sexual intercourse with a child under eighteen (18) years old, who is in the Defendant's care as a step-child. On that date, the Defendant had sexual intercourse twice. He has had intercourse with this step-child once or twice each week since she was eight (8) years old. And the complainant (sic) is signed by (minor) and a Frances Jackson.
Marvin Bull Chief:	ah . . . .
Judge Hamilton:	All I want from you is a plea of guilty or not guilty.
Marvin Bull Chief:	I'm not sure . . . guilty, I guess.
Judge Hamilton:	You're entering a plea of guilty?
Marvin Bull Chief:	Yeah! I don't know . . ."

The determination by the tribal judge that Appellant understood the complaint and violation with which he was charged and to accept the guilty plea was made while observing the appearance and demeanor of the Appellant. This Court also questioned the Appellant to determine his ability to understand because there was no verbal response by Appellant in a portion of the arraignment transcript and Appellant's lay counselor argued to this Court it was because Appellant was illiterate or uneducated and he did not understand the complaint or nature of the proceedings when he entered a plea of guilty.

The Appellant appeared to this Court to be a normal and intelligent individual who could read and write (See Exhibit B). After some questioning by this Court, it was clear Appellant did understand what he was doing at arraignment when he

entered a plea of guilty to five (5) counts of Aggravated Sexual Assault without the assistance of counsel. (Appeal Hearing Transcript, Page 14, Lines 15—25, and Page 15, Lines 1—2).

In conclusion, the failure of the tribal judge to advise Appellant of the maximum authorized penalty in the instant case was harmless error and did not violate Appellant's rights under the CCOJ and ICRA for the following three reasons. First, 25 USC Section 1302(6) only requires the person to be informed of the nature and cause of the accusation of which Appellant was advised. Second, as argued by Appellant's lay counselor, the key issue was whether the judge had determined if Appellant understands the complaint and the section of the tribal code which he is charged with violating, including the maximum authorized penalty. Although Appellant was not specifically advised of the maximum authorized penalty, he was advised he was charged with a felony and it was obvious to the tribal judge and this Court he did understand the complaint and section of the tribal code which he was charged with violating when he entered his guilty plea. Finally, Appellant had retained a lay counselor and had an opportunity to change his guilty plea at the hearing October 24, 1988 which he did not do.

II. WHETHER THERE WAS REAL OR PHYSICAL EVIDENCE TO SUBSTANTIATE A CONVICTION.

A criminal complaint was signed on October 12, 1988 by the victim, Appellant's step—daughter, and Frances Jackson, Appellant's sister-in-law and Appellant was advised of the above at his arrest on October 12, 1988 and at his arraignment October 13, 1988. The complaint alleged five (5) counts of Aggravated Sexual Assault by Appellant and was subscribed and sworn to before Special Prosecutor, Ron Arneson. Although the complaint could have been more artfully drafted to set out each of the five (5) counts, it still contained the basic requirements of II CCOJ 103(b)(1), (2), (3), (4) & (5). For the time being, there did not need to be a presentation of real or physical evidence by the prosecution until the trial.

Title 25 USC Section 1302(6) does not require a jury trial in all criminal cases but states in part, "No Indian tribe in exercising powers of self—government shall———.., deny to any persons in a criminal proceeding the right to a speedy and public trial." Appellant was advised of his right to a speedy and public trial and knowingly plead guilty to the five (5) counts rather than subject himself to a trial.

In the event Appellant demanded a trial, the prosecution would have had the burden of prove and had to present its real or physical evidence to substantiate a conviction. Title III CCOJ 103 reads as follows:

> "(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 required the defendant to prove the defense by a preponderance of evidence."

By pleading guilty to the five (5) counts, Appellant waived his right to a trial, relieved the Tribe of its burden of proof and also waived his right to raise any defenses. Therefore, whether there was real or physical evidence in addition to the criminal complaint subscribed and sworn to by the Appellant's step—daughter and sister—in—law to substantiate a conviction is moot.

III. WHETHER THERE WAS EVIDENCE TO CHARGE APPELLANT WITH FIVE FELONY COUNTS OR WHETHER APPELLANT SHOULD HAVE ONLY BEEN CHARGED WITH MISDEMEANOR VIOLATIONS.

This Court's discussion of the second issue in part addresses the third issue. There was evidence by way of a complaint sworn to by a step-daughter and sister-in-law that Appellant had committed the offense of Aggravated Sexual Assault of a Child, five counts, in violation of III CCOJ 214(a).

Appellant's waiving his right to a jury trial and plea of guilty to the five (5) counts set forth in the criminal complaint relieves the Tribes of its burden of proving whether there was evidence to charge Appellant with five (5) felony counts. However, on its face, the criminal complaint alleges facts sufficient to support charging a felony violation of III CCOJ 214(a). The criminal complaint states, "defendant had sexual intercourse with a child under 18 years old who is in the defendants (sic) care as a step child" which is a violation of III CCOJ 214(a) The criminal complaint sets out facts for at least five (5) where it states, "On that date the defendant had sexual intercourse twice. He has had intercourse with this step child once or twice each week since she was 8 yrs old".

Therefore, there was evidence to charge Appellant with five felony counts.

IV. WHETHER THE APPELLANT'S RIGHTS WERE VIOLATED BY NOT BEING ABLE TO CHANGE HIS PLEA AND REQUEST A JURY TRIAL.

At the sentencing on October 24, 1988, Appellant was represented by a lay counselor. The sentencing hearing is the first and only proceeding following Appellant's arraignment at which he entered his plea of guilty. At this hearing, the record does not reflect a motion for change of plea or request for a jury trial made by either Appellant or his lay counselor.

Although Appellant has raised an issue which was not raised prior to oral arguments in any tribal court proceeding or document filed with this Court, Appellant's issue will be addressed. The transcripts of all proceedings prior to oral arguments do not reflect where Appellant was not allowed to change his plea and denied a jury trial. Therefore, Appellant's rights could not have been violated.

V. WHETHER THE COURT WAS NEGLIGENT IN PERFORMING A PRE-SENTENCE INVESTIGATION.

In addressing the above issue, nothing in the sentencing provisions in the CCOJ requires that the Tribal Court perform a pre—sentence investigation. Upon a plea of guilty, II CCOJ 401(e) (2) is applicable and reads in part,

> "...
>
> "(2) If the accused pleads "guilty" to the charge, the Judge ... may then impose sentence or defer sentencing for a reasonable time in order to obtain any information he deems necessary for the imposition of a just sentence...."

Therefore, the Court cannot be negligent in performing a pre—sentence investigation when it has no duty to do so and Appellant's issue is without merit.

VI. WHETHER THE SENTENCE EXCEEDS BY FAR

SIMILAR PREVIOUS CASES FROM THE SAME COURT AND DOES NOT CONFORM TO EQUALITY AND THE PRINCIPLES OF SUBSTANTIAL UNIFORMITY.

The Tribal Court is limited in its sentencing by 25 USC Section 1302(7). This Section reads as follows:

> "...
>
> "(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both;
>
> "...."

On October 28, 1988, the Court imposed sentence and ordered Appellant to serve five (5) one (1) year terms to run consecutive for a total sentence in detention of five (5) years. Appellant received one (1) year for each of the five (5) offenses. The Court further ordered Appellant could arrange release on probation at anytime after one (1) year from the date of the order upon certain terms and conditions. The certain terms and conditions imposed by the Court were the Indian Health Service was ordered to do a complete evaluation of the Appellant and complete an appropriate plan of treatment.

The plan was to include placement of the Appellant in an appropriate treatment facility and he was ordered to comply with all rules and regulations in the treatment facility. Appellant was further ordered to make a good faith attempt to complete the treatment program set up by qualified personnel. Appellant was to be released from the treatment facility when ordered by the Court upon a written recommendation of a licensed psychologist or psychiatrist or other qualified professional when the aforementioned professional determined the Appellant was no longer a danger to other persons in the community. If the release was recommended prior to October 14, 1993, the Appellant was to be placed on probation for the remainder of time and a probation agreement was to be drafted and signed by the Appellant prior to any early released from detention.

Finally, the Court ordered Appellant to pay reasonable medical costs not paid by other sources for mental health treatment to the juvenile involved. Appellant was further ordered to pay $10,000.00 restitution to the juvenile victim.

This Court was not provided with evidence by Appellant that his sentence exceeded similar sentences imposed in previous cases from the same Court. Because Appellant raised the issue, it was Appellant's duty to provide evidence to support the same. In addition, during oral argument lay counselor agreed to throw out issue number six (6). (Oral Argument Transcript, p. 27, L. 14-19.) Therefore, without evidence to the contrary, this Court must determine the sentence conforms to equality and the principles of substantial uniformity. However, this Court will address whether Appellant will suffer cruel and unusual punishment in violation of 25 USC Section 1302 (7) by imposition of five (5) one (1) year sentences for five (5) counts of Aggravated Sexual Assault although this issue was not raised by either lay counselor.

There is one case which directly deals with this issue, Ramos v Pyramid Tribal Court (1985 DC Nev) 621 F Supp 967. In Ramos, a Tribe member did not suffer cruel and unusual punishment in violation of 25 USC Section 1302(7), when Tribal Court imposed over 2-year consecutive sentence upon conviction of 7 offenses, where none of imposed sentences violated prohibition of more than 6 months' imprisonment for any one offense.

In concurring with the Court's position in Ramos, this Court finds that Appellant will not suffer cruel and unusual punishment in violation of 25 USC Section 1302(7) by imposition of five (5) one (1) year consecutive sentences for conviction of five (5) counts of Aggravated Sexual Assaults. Therefore, this Court does not find that Appellant's sentence exceeds that imposed in similar cases nor is the same cruel and unusual punishment in violation 25 USC Section 1302(7).

THEREFORE, IT IS THE UNANIMOUS DECISION OF THIS COURT THAT THE APPELLANT UNDERSTOOD THE NATURE OF THE PROCEEDINGS AND HIS RIGHTS AND TO AFFIRM THE DECISION OF THE LOWER COURT AND ORDER APPELLANT TO IMMEDIATELY BEGIN SERVING THE BALANCE OF HIS SENTENCE.

DATED this _____ day of May, 1989.

BY THE COURT OF APPEALS:

_____
Arnie A. Hove, Chief Justice

_____
Gary James Melbourne, Associate Justice

_____
Floyd Azure, Associate Justice