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

IN RE THE MATTER OF SONYA BURSHIA,
A WARD OF THE COURT/APPELLANT.

Appeal No. 069

THIS APPEAL is from two (2) charges for Disorderly Conduct, violations of III CCOJ 413, and a Petition to Transfer Juvenile Proceeding To Adult Court as a result thereof. The petition was granted and defendant was tried as an adult and convicted of the charges by the Honorable Terry L. Boyd, Associate Judge.

FOR APPELLEE/PLAINTIFF: Ron Arneson, Special Prosecutor, P.O. Box 1027, Wolf Point, Montana 59201

FOR APPELLANT/DEFENDANT: Melissa Melton, Lay Advocate, P.O. Box 214, Wolf Point, Montana 59201

CRIMINAL/JUVENILE: THERE MUST BE FINDINGS OF FACT AT A HEARING TO TRANSFER JUVENILE PROCEEDINGS PURSUANT TO V CCOJ 304; TITLE I CCOJ 103 REQUIRES THE PRESERVATION OF THE TESTIMONY FOR PERPETUAL MEMORY BY ELECTRONIC RECORDING OR OTHERWISE AT THE V CCOJ 305(a) FACT FINDING HEARING; THE JUVENILE, GUARDIAN AD LITEM AND PROSECUTOR MUST RECEIVE NOTICE AS REQUIRED BY V CCOJ 305(b) AT LEAST FORTY-EIGHT (48) HOURS BEFORE THE HEARING

Argued: June 20, 1989 Decided: June 20, 1989

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

HELD: APPELLANT WAS DENIED DUE PROCESS WHEN THE COURT FAILED TO GIVE AT LEAST FORTY-EIGHT (48) HOURS NOTICE OF THE V CCOJ 305(a) FACT FINDING HEARING AND THE RECORD BEFORE THIS COURT DID NOT ESTABLISH VIOLATIONS OF III CCOJ 413 AND 413(g). THEREFORE, THE ORDER TRANSFERRING PROCEEDING TO ADULT COURT IS VACATED AND THE CRIMINAL COMPLAINTS CHARGING DISORDERLY CONDUCT, VIOLATIONS OF III CCOJ 413 AND 413(g) ARE DISMISSED.

FACTS:

On April 4, 1989 at 11:00 p.m., Appellant was alleged to have violated III CCOJ 413(g). The complaint alleges Appellant "did with intent to harass, alarm or annoy another person, or in reckless disregard of the fact that another person was harassed, annoyed or alarmed by her behavior, created a seriously alarming condition by kicking at the windows of a patrol car and cursing officer Robert Daniels." The complaint was signed by Officer Robert Daniels.

On April 17, 1989, Appellant was again charged with Disorderly Conduct, a violation of III CCOJ 413. The criminal complaint reads, "At 2309 4 —17-89, an anonymous (sic) caller reported an intoxicated female on 2nd avenue (sic) south (sic) by Library, At 2311, I observed Sonya (sic) Burshia staggering on Main street (sic) very intoxicated in a condition she was in, she unable to care for herself. I placed her under arrest for Disorderly Conduct for her own safety." The complaint was signed by Prosecutor Emmett Buckles and Officer David Littlehead.

The record does not show where findings of fact were made by the court at the V CCOJ 305(a) hearing. Furthermore, there is no transcript of the testimony from an electronic recording or otherwise for this Court's review.

Appellant filed a Notice of Appeal of Emancipation on April 20, 1989 and appeals the action taken by the Tribal Court on April 7, 1989 in Poplar, Montana. Appellant alleges that at the hearing, she was improperly emancipated for the purpose of lack of space in the jail facility; for a specific period of time; and on a specific charge. The issues presented by Appellant and to be addressed by this Court are,

1. Whether temporary emancipation is highly irregular.
2. Whether procedure for the transfer of juvenile proceedings to adult court were not properly followed.

I.

This Court has no record of the findings of fact by the Tribal Court at the V CCOJ 305(a) fact-finding hearing. Furthermore, this Court has no record or transcript of the proceedings held on April 7, 1989.

Title I CCOJ 103 in part reads,

"The Court shall keep a record of all proceedings of the Court, showing the title of the case, the names and addresses of the parties, attorneys and witnesses; the substance of the complaint; the dates of all hearings or trials; the name of the judge; the findings of the Court or verdict of the jury and judgment; the preservation of testimony for perpetual memory by electronic recording, or otherwise; together with any other facts or circumstances deemed of importance to the case...."

It is incumbent upon the Tribal Court to keep a record of all proceedings. It is also incumbent on the Tribal Court to preserve the testimony at all proceedings. Appellant has raised an issue as to the nature of her emancipation; whether it is temporary and improper under the code. This Court has no way of reviewing the actions of the Tribal Court without the complete record required by I CCOJ 103.

It is incumbent on this Court to review the record and determination of the Tribal Court according to the extent of its jurisdiction set forth in I CCOJ 202. in part as follows:

"The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Trial 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 if such determinations are supported by substantial evidence...."

In Appellant's case, there is no way to review the determinations of the Tribal Court on matters of law or determine if there is substantial evidence to support the factual determinations. This Court's inability to review the above, is directly attributable to the failure to make the proper record required by I CCOJ 103 and/or the Tribal Court clerk's failure to comply with I CCOJ 209 which reads,

"Within five days after a notice of appeal is filed in a criminal case or a petition for review is filed in a civil case, the Clerk of the Tribal Court shall certify and filed with the Court of Appeals all papers comprising the record of the case."

The Appellant has alleged there was temporary emancipation without proper reasons. Because of the lack of findings and a recording of the proceedings, this Court has no choice but to find there must have been the temporary emancipation for the reasons as given by Appellant and the same is not contemplated by the code.

Title V CCOJ 304 was not followed by the Tribal Court when Appellant was emancipated for two (2) disorderly conduct charges which are misdemeanors under III CCOJ 403, and 403 (g). Disorderly conduct charges can not be considered serious crimes as contemplated by the code to warrant transferring juvenile proceedings to adult court. In addition, the record is incomplete and does not contain facts to support findings of Appellant's guilt on the two (2) disorderly conduct charges. Therefore, the order transferring Appellant's proceedings to adult court is hereby vacated.

II.

Appellant has alleged the tribal Court failed to follow proper procedure when transferring her proceedings into adult court. The procedure for properly transferring a juvenile into adult court is set forth in Title V of the CCOJ. Title V CCOJ 304, 305, and part of 306 will be set forth and discussed herein.

Title V CCOJ 304 reads,

"Upon motion of petitioner or on its own motion, the Court may waive juvenile proceedings so that the child may be tried as an adult in the Fort Peck Tribal Court where (a) the child is sixteen years of age or more; and (b) the child has previously been found to be a delinquent. In determining whether the child should be tried as an adult the Court shall consider the seriousness of the crime alleged to have been committed; the extent of the child's prior delinquency record; the possibility of rehabilitation of the child; and the effects of prior attempts to rehabilitate the child. The Court shall provide the child and the child's authorized representative with prior notice of a hearing on this issue, as provided in Section 305(b) and shall hold a hearing as provided in Section 305(c) of this Title."

As stated previously, the Tribal Court failed to make specific findings and present the same along with the recording of proceedings to this Court. Because there are no findings or record, there is no way to determine if the factors in V CCOJ 304 were determined and/or present, i.e. the age of the child, if she was previously found to be delinquent and etc. In addition, it is not possible to know whether the Tribal Court determined these particular Disorderly Conduct charges were serious crimes; this child had an extensive prior delinquency record; or if there was or wasn't a possibility of rehabilitation of the child because of prior attempts at the same. Finally, the record does not disclose if prior notice as provided in Section 305(b) *was* given. At oral arguments, Appellant's Counsel presented the Court with an unsigned copy of a Petition to Transfer Juvenile proceeding to Adult Court dated April 7, 1989. The petition set the hearing for April 7, 1989 at 3:00 p.m. Appellant's counsel claims she was handed this petition immediately before entering the judge's chambers for the hearing. Special Prosecutor Arneson stated he received no notice of the hearing nor was he present.

Appellant is entitled to due process as provided under the CCOJ. Furthermore, all defendants are entitled to prior notice of any proceedings in Tribal Court to afford them the opportunity to obtain counsel, prepare a defense and etc. In the instant case, Appellant is entitled to due process as provided for in V CCOJ 305 which reads,

"(a) When a fact-finding hearing shall be held. The fact-finding hearing shall be held as soon after the petition is filed as possible, and immediately following receipt of a social study or such other evidence sufficient to enable the Court to make its determination. In all cases the final hearing shall be held within 30 days of the filing of the petition, unless the child or the child's authorized representative requests a postponement.

"(b) Notice. The Court shall serve prior written notice of the date, time, and place of the hearing upon the child, any person authorized to represent the child, and the parent or guardian. Notice shall be served in person or by certified mail, return receipt requested. The notice shall also specify that the child (and any other party served with notice) has a right to retain counsel at his or her own expense, be present, testify, present documentary evidence, call witnesses, and ask questions of all witnesses.

"(c) Procedures. The child may be physically present at the fact-finding hearing in the Court's discretion, except that in delinquency cases, the child must be present. Hearings shall be closed to the general public. The Court may require the testimony of a physician or child care expert based on an examination of the child. The child or his authorized representative, and the parent, guardian or custodian may summon or produce such witnesses and relevant evidence as they may desire, and may be represented by counsel at his or her own expense. The Court may call such witnesses as it deems necessary.

"(d) Order. If the Court shall find, after the fact-finding hearing that (a) there is clear and convincing evidence that the child is abuse, neglected, abandoned, or a status offender, or (b) that there is evidence beyond a

reasonable doubt that the child is a delinquent, the Court shall determine the proper disposition of the child under Section 306(d) of this Title. Otherwise, the petition shall be dismissed."

Paragraph (a) states that a hearing must be held "within thirty days of the filing of the petition". This section does not provide a minimum time for preparation for a hearing to transfer juvenile proceedings. The petition presented to this Court reflects the petition was dated the same date as the hearing. In no case can a juvenile and their attorney or lay counselor be expected to come into Tribal Court and participate in a transfer proceeding unless given at least forty-eight (48) hours notice.

Any juvenile expected to participate in a V CCOJ 304 transfer proceeding must be given at least forty-eight (48) hours in the instant case denied Appellant due process.

Because the record is not clear, and since there was some confusion by counsel, this Court was made to believe the dispositional hearing was also held April 7, 1989 and what was done in the instant case may not have been in the best interests of the child. Title CCOJ 306 controls the procedure for conducting a dispositional hearing and reads,

"(a) When a dispositional hearing shall be held. A dispositional hearing shall be conducted as soon as practicable after the conclusion of the fact-finding hearing. Adequate time between the hearings, not to exceed 15 working days, shall be allowed to permit the Court to consider the dispositional alternatives that are in the best interests of the child.

"(b) Rights of the parties to the dispositional hearings. All those rights provided at the fact-finding hearing shall be provided at dispositional hearing. If the dispositional hearing is scheduled for a separate proceeding at a later date than the fact— finding hearing, the notice requirements of this Chapter shall apply.

"The child shall be physically present at the dispositional hearing if over ten (10) years of age unless the Court determines that the child would likely suffer severe emotional harm as a result of such presence. Otherwise the presence of the child shall be in the discretion of the Court. The Court in its discretion may confer with the child with only the guardian ad litem present in order to determine the child's desires concerning disposition.

"(c) Evidence. At the dispositional hearing the Court shall hear evidence and the parties shall have the right to introduce evidence on the matter of proper disposition. The Court shall consider all relevant reports submitted at the hearing in making a disposition, including any reports prepared by the child and his or her representative.

"(d) Disposition.

"(1) Best interests of child. The Court shall make such disposition as is in the best interests of the child.

"(2) Abused, neglected, or abandoned children. The Court shall order one of the following dispositions, listed in suggested order of preference;

" "

As stated previously, this Court lacks an adequate record from which to review this case and whether the Tribal Court complied with V CCOJ 306. In conclusion, because there are no notices of the dispositional hearing in the record, this Court must find the Tribal Court did not comply with V CCOJ 306; make "such disposition as is in the best interests of the child"; and follow proper procedure. Therefore, and because Appellant's due process rights were denied, dismissal of the charges against Appellant for disorderly conduct is warranted and appropriate in the instant case.

APPELLANT WAS DENIED DUE PROCESS WHEN THE COURT FAILED TO GIVE AT LEAST FORTY-EIGHT (48) HOURS NOTICE OF THE V CCOJ 305(a) FACT FINDING HEARING AND THE RECORD BEFORE THIS COURT DID NOT ESTABLISH VIOLATIONS OF III CCOJ 413 AND 413(g). THEREFORE, THE ORDER TRANSFERRING PROCEEDING TO ADULT COURT IS HEREBY VACATED AND THE CRIMINAL COMPLAINTS CHARGING DISORDERLY CONDUCT, VIOLATIONS OF III CCOJ 413 AND 413(g) ARE DISMISSED.

DATED this ____ day of July, 1989.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd Azure, Associate Justice
