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

FORT PECK TRIBES,
Plaintiff/Appellee,

vs. **Appeal No. 078**

MARY ANN COMESLAST EASHAPPIE,
Defendant/Appellant.

THIS APPEAL is from a judgment of guilty of Theft, a violation of III CCOJ 304, entered on the 27th day of September, 1988 at the Fort Peck Tribal Court, Assiniboine and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable Violet E. Hamilton presided.

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

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

CRIMINAL: TITLE II CCOJ 601 REQUIRES THE TRIBAL COURT GIVE CREDIT TO ANY PERSON CONVICTED OF A CRIMINAL OFFENSE FOR ALL TIME SPENT IN CUSTODY IN AN INSTITUTION AS A RESULT OF THE CHARGE FOR WHICH A SENTENCE WAS IMPOSED; THE CCOJ DOES NOT GIVE THE TRIBAL COURT UNLIMITED AUTHORITY TO UNILATERALLY AND ARBITRARILY REMOVE A CHILD FROM ITS PARENT AND TO IMPOSE A SENTENCE WITHOUT GIVING CREDIT FOR TIME SERVED IS EXCESSIVE UNDER AND IN VIOLATION OF II CCOJ 601.

ARGUED: July 7, 1989. **DECIDED:** July 7, 1989.

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

HELD: THE TRIBAL COURT'S PREVIOUS ORDERS OF COMMITMENT AND PLACEMENT OF HER UNBORN CHILD WITH SOCIAL SERVICES VIOLATED APPELLANT'S CIVIL RIGHTS AND ARE HEREBY VACATED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR ENTRY OF A JUDGMENT IN CONFORMITY WITH THIS OPINION.

FACTS:

On September 23, 1988, appellant was charged with theft a violation of III CCOJ 304. Appellant was alleged to have attempted to remove a six pack of Coors Beer and 1 pack of cigarettes and 2 hot dogs from the Town Pump. The beer and

cigarettes were recovered, however, appellant had gone into the ladies room and ate the hot dogs. Appellant had no money to pay for the items.

On September 26, 1988, appellant entered a plea of guilty to the offense. On that date, a Final Disposition was entered wherein appellant received a sentence of "31 days in Detox & 18 months probation & AA meetings."

On September 27, 1988, the Tribal Court issued a follow-up order entitled "Court Order to Spotted Bull Treatment Center." In the above, the Tribal Court ordered the following:

> "That Mary Ann be court ordered to the Spotted Bull Treatment Center for a period of thirty-one (31) days. When Mary Ann is due to have her baby, that she will be taken to the Poplar Community Hospital. After her release from the hospital, her new born baby will be placed in the custody of Social Services * Mary Ann will return to finish our her time at the Spotted Bull Treatment Center. After her release for the Spotted Bull Treatment Center, she will be placed on a 17-month Follow-Up and will attend two AA Meetings per week in Wolf Point. (WEDNESDAY NIGHT AND FRIDAY NIGHT), until the end of her probation/ Follow-Up."

On October 24, 1988, appellant's lay counselor filed a Notice of Appeal and a Motion for Stay of Sentence Pending Appeal. The grounds for appellant's appeals were as follows:

> "1. That, in serving her sentence, defendant has not been given credit for approximately 1week served in the Roosevelt County Jail. The question to this court simply, Is the lower court mandated to give defendant credit for that time by virtue of TITLE II, CHAPTER 6, SECTION 601 which reads in part as follows:
>
> ON ANY SENTENCE OF IMPRISONMENT, CREDIT SHALL BE GIVEN FOR ALL TIME SPENT IN CUSTODY IN AN INSTITUTION AS A RESULT OF THE CHARGE FOR WHICH THE SENTENCE WAS IMPOSED.
>
> IMPRISONMENT MAY INCLUDE COMMITMENT TO AN APPROPRIATE INSTITUTION OR PROGRAM, EITHER ON OR OFF THE RESERVATION, FOR CARE, TREATMENT, EVALUATION , OR REHABILITATION OF THE OFFENDER.
>
> "2. That, defendant was not informed that the court intended to take her unborn child away at birth and the court was going to make it a part of it's order. QUESTION, Should the lower court have given proper notice to the mother/defendant? Should the lower court informed the father of such an action and provided him an opportunity to be present?
>
> "3. That, this court after reviewing the sentence imposed by the lower court defendant then poses the question of wether (sic) or not said sentence is cruel and unusal (sic) or excessive punishment?"

On October 24, 1988, appellant also filed a Motion for Extension on Appeal. The reason for the motion was as follows:

"1. It was not the intention of the defendant to take an appeal but after having been served on the 20th day of October, 1988 with a copy of the sentence imposed by the trial court, defendant finds that she was not aware that the sentence included taking her child away at birth. Said service was made after the 15 day limit allowed in which to file an appeal and the defendant is without recourse unless this court grants the foregoing motion."

The record before this Court does not reflect appellant received a copy of the sentence imposed by the Tribal Court, within 15 working days of the orders of commitment. On October 24, 1988, appellant's stay was granted and on October 25, 1988, appellant's extension was granted.

The issues to be addressed by this Court are as follows:

I. Whether II CCOJ 601 requires the Tribal Court to give appellant credit for jail time when sentenced to 31 days at Spotted Bull Treatment Center.

II. Whether the Court intended to take custody of Appellant's child by virtue of the September 27, 1988 order and appellant received proper notice thereof.

III. Whether appellant's sentence is cruel and unusual or excessive punishment in violation of the Indian Civil Rights Act.

I.

Appellant contends she should have been given credit for the time served in the Roosevelt County Jail against the 31 days she was ordered to serve at the Spotted Bull Treatment Center. In support of her position, appellant relies on certain language in II CCOJ 601. This section reads in part as follows:

"Any person who has been convicted of an offense enumerated in this Code may be sentenced by the Court to one (1) combination of the following penalties:

"(a) Imprisonment for a period not to exceed the maximum permitted by the code provision defining the offense. Imprisonment may be continuous or intermittent. On any sentence of imprisonment, credit shall be given for all time spent in custody in an institution as a result of the charge for which the sentence was imposed. Imprisonment may include commitment to an appropriate institution or program, either on or off the Reservation. for care, treatment, evaluation, or rehabilitation of the offender. Anyone receiving physical custody of a person sentenced by the Court shall be acting solely as an agent of the Tribes and Court. Jurisdiction over a person sentenced to a program or institution off the Reservation shall be absolutely retained by the Tribes and the Court. No placement off the Reservation shall be valid unless first approved in writing by the Chief Judge and any order of such placement shall specify that the Tribes and the Court retain jurisdiction over any person so placed.

"...." (Emphasis Added.)

On September 26, 1988, appellant was adjudged guilty of Theft, a violation of III CCOJ 304. As a part of the sentence, which included 18 months probation, the Tribal Court ordered appellant to serve 31 days in a detoxification program.

Appellant was committed to the Spotted Bull Treatment Center on the Reservation for its 31 day alcohol treatment program. The Court Order To Spotted Bull Treatment Center dated September 27, 1988 and the Final Disposition dated September 26, 1988 gave no credit for the time appellant served in the Roosevelt County Jail.

The Tribal Court in imposing a sentence must meet the requirements of II CCOJ 601. Title II CCOJ 601 requires the Tribal Court give credit to any person convicted of a criminal offense in the CCOJ for all time spent in custody in an institution as a result of the charge for which a sentence was imposed. Appellant's time spent at Spotted Bull Treatment Center was for the September 23, 1988 theft. Title II CCOJ 601 specifically allows imprisonment to include commitment to an appropriate institution or program for care, treatment, evaluation, or rehabilitation of the offender such as placement in detoxification at Spotted Bull treatment Center. Therefore, Appellant must be given credit for time spent in the Roosevelt County jail on the 31 days he has been ordered to serve at the Spotted Bull Treatment Center.

In addition, the Tribal Court's Court Order to Spotted Bull Treatment Center and Final Disposition denied Appellant her rights under the Indian Civil Rights Act (hereinafter ICRA). Appellant was denied equal protection under the CCOJ in violation of 25 U.S.C. Section 1302(8) when ordered to serve 31 days without being given credit for time served in jail.

The Tribe's prosecutor argued that it was necessary for Appellant to serve a full 31 days at Spotted Bull Treatment Center since that was the length of the program. If that is the case, the Tribal Court should have taken into account the length of the Spotted Bull Treatment Center program and time previously spent by Appellant in jail before imposing a sentence for a commitment of only 31 days.

In conclusion, the Tribal Court erred in failing to give appellant credit for the time spent in the Roosevelt County Jail as a result of the September 23, 1989 Theft. This failure violated Appellant's rights under the ICRA and therefore requires the extreme measure of vacating the Tribal Court's previous orders of commitment. This matter is remanded to Tribal Court for entry of an order of commitment for 31 days to Spotted Bull Treatment Center with credit to be given appellant for the time she spent in the Roosevelt County Jail.

II.

Appellant's contends she was not informed the Tribal Court intended to take her unborn child away at birth as a part of it's order. The Court Order To Spotted Bull Treatment Center dated September 27, 1988 in effect does place appellant's unborn baby in the custody of Social Services. Furthermore, the order does not provide a date for the return of the baby to appellant.

On October 24, 1988, this Court granted appellant's Motion for Stay of Sentence Pending Appeal of the Court Order To Spotted Bull Treatment Center. As a result of the stay, the baby was never removed from the custody of appellant.

Title V CCOJ 101 gives exclusive jurisdiction over Indian children to the juvenile court. This section reads in full as follows:

> "The Fort Peck Tribal Juvenile Court shall have exclusive original jurisdiction over all matters involving Indian children covered by this Title."

Title V of the Juvenile Code sets forth appropriate procedures for the removal of a child from its home (parent or custodian) by the juvenile court. The Tribal Court's record and Court Order To Spotted Bull Treatment Center dated September 27, 1988 do not reflect on the reasons appellant's child was to be removed from her upon its birth. Furthermore, the Tribal Court's record and order do not reflect that the procedures in Title V were followed.

The CCOJ does not give the Tribal Court unlimited authority to unilaterally and arbitrarily remove a child from its parent. In addition, 25 U.S.C. 1302(8) of the ICRA specifically protects against this type of action where appellant's child was placed with Social Services without affording equal protection of its laws. Therefore, the Tribal Court's order placing appellant's unborn child in the custody of Social Services is hereby vacated.

III.

Appellant's second issue requires this Court to determine if the sentence was cruel and unusual or excessive punishment. The issue will be addressed in two parts.

The Tribal Court's sentence on September 26, 1988 is not unusual under II CC0J 601. Appellant entered a plea of guilty to Theft, a Class A misdemeanor. For a Class A misdemeanor, under III CCOJ 501(2), appellant could have received a maximum penalty of three months imprisonment, a fine of five hundred dollars ($500.00), or both. Appellant received thirty-one days in the Spotted Bull Treatment Center which is permitted under II CCOJ 601.

Appellant's sentence of thirty-one days was not excessive under III CCOJ 501(2), however, II CCOJ 601 required credit be given to Appellant for time spent in the Roosevelt County Jail on this offense. Therefore, the sentence was excessive under and in violation of II CCOJ 601. Appellant's sentence is remanded to Tribal Court for entry of a judgment in conformity with this opinion.

THE TRIBAL COURT'S PREVIOUS ORDERS OF COMMITMENT AND PLACEMENT OF HER UNBORN CHILD WITH SOCIAL SERVICES VIOLATED APPELLANT'S CIVIL RIGHTS AND ARE HEREBY VACATED. THIS MATTER IS REMANDED TO TRIBAL COURT FOR ENTRY OF A JUDGMENT IN CONFORMITY WITH THIS OPINION.

DATED this _____ day of September, 1989.

BY THE COURT OF APPEALS:

_____
ARNIE A. HOVE, Chief Justice

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GARY JAMES MELBOURNE, Associate Justice

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FLOYD AZURE, Associate Justice