

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

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FORT PECK TRIBES,

Plaintiff/Appellant,

vs.

CRAIG AZURE, PERRY LILLEY,
and WARREN WARCLUB,

Defendant/Appellee,

Appeal No. 081

O P I N I O N

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THIS APPEAL is from the Fort Peck Tribal Court, Assiniboiné and Sioux Tribes, Fort Peck Indian Reservation, Poplar, Montana. The Honorable William McClammy, Chief Judge (deceased), presided.

FOR APPELLANT: Ron Arneson, Special Tribal Prosecutor, P.O. Box 1133, Wolf Point, Montana 59201.

FOR APPELLEE: Clayton Reum, Lay Counselor, 821-6th Avenue S., Wolf Point, Montana 59201.

CRIMINAL: AN EX PARTE ORDER DISQUALIFYING A JUDGE UNDER I CCOJ 307 VIOLATES CANON 15, CODE OF ETHICS FOR ATTORNEYS AND LAY COUNSELORS AND CANON 3(A)(4), CODE OF ETHICS FOR JUDGES AND JUSTICES AND DENIES BASIC DUE PROCESS AND EQUAL PROTECTION UNDER THE LAW TO THE AFFECTED PARTY; AND DEFENDANT IS NOT DENIED A SPEEDY TRIAL WHEN THE CONDUCT RESULTING IN THE DELAY IS ATTRIBUTABLE TO DEFENDANTS AND/OR THEIR ATTORNEY.

ARGUED: July 7, 1989. DECIDED: October 3, 1989.

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

HELD: THE EX PARTE ORDER DATED OCTOBER 31, 1988 WHICH DISQUALIFIED THE TRIBAL JUDGE WITHOUT THE NECESSARY FINDING IN I CCOJ 307, AND PROVIDING BOTH PARTIES REASONABLE OPPORTUNITY TO BE HEARD ON THE MATTER VIOLATED BASIC DUE PROCESS AND DENIED EQUAL PROTECTION UNDER THE LAW TO THE TRIBES. THE CHIEF JUDGE IS DIRECTED TO PRESCRIBE WRITTEN RULES AND TO DEAL WITH DISQUALIFICATIONS UNDER I CCOJ 307 AND PRESENT THEM TO THE TRIBAL EXECUTIVE BOARD FOR APPROVAL WITHIN THIRTY (30) DAYS, IF POSSIBLE. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A TRIAL WITHIN TWENTY (20) DAYS OF THE FILING OF THIS OPINION.

F A C T S :

On October 31, 1988, Appellees Azure and War Club and the attorney for Appellee Lilley filed a motion with Chief Judge William McClammy to disqualify Associate Judge Violet Hamilton. In Defendants' Motion to Disqualify Judge, the reason given for Appellee Azure's disqualification of Judge Hamilton was as follows:

"I have retained Clayton Reum, lay advocate, to be my representative in this criminal proceeding. I have been told by Clayton Reum that Violet Hamilton, Judge of the Tribal Court, has just suspended Clayton Reum from practice before her court. I therefore feel that Judge Hamilton's impartiality in my trial might reasonably be questioned, based on my choice of counsel."

Appellee War Club and Lilley joined in the motion, however, gave no additional reasons for the disqualification of Judge Hamilton.

On October 31, 1988, an Order of Disqualification was signed by Chief Judge William McClammy. The Tribes' special prosecutor was served with the motion and order on November 8, 1988. The record does not reflect the special prosecutor received notice of the October 31, 1988 hearing. The court file does not include a transcript of the hearing.

On November 9, 1988, the Tribes filed an interlocutory motion entitled Motion for Hearing on Disqualification of Judge Hamilton, Violation of Due Process and Equal Protection, and No Notice. The Tribes allege the disqualification of Judge Hamilton by Chief Judge McClammy was a violation of due process and equal protection under the law. The Tribes also requested a

stay on the proceeding at the lower court level until the motion was heard.

On December 19, 1988, attorney for Appellee Lilley filed a motion entitled Motion to Deny Interlocutory Appeal Filed by Prosecution. The reasons set forth for the motion were as follows:

A. Absence of Case or Controversy:

1. It is not alleged that the defendants violated the provisions of Title I, Section 307 when they requested the disqualification of Judge Hamilton.
2. It is not alleged that the Tribes will be unable to have a fair trial before Judge Gourneau.
3. It appears that said interlocutory appeal has been filed in order to obtain an opinion declaring that Title I, Section 307 is unconstitutional.

B. Denial of Defendants' Rights in that the Special Prosecutor refused to stipulate that the time consumed by the appeal will be counted for 'speedy trial' considerations."

On June 9, 1989, this Court granted the Tribe's appeal finding it had jurisdiction under I CCOJ 202.

Oral arguments were heard on the 9th day of June, 1989. The issues presented and which will be reviewed by this Court's review are as follows:

1. Whether Appellee's counsel's ex parte motion for the disqualification of Judge Hamilton violated due process and equal protection under the law to the Tribes.
2. Whether the time consumed by this appeal should be counted against the Tribes for

'speedy trial' considerations.

I.

Whether Appellee's counsel's ex parte motion for the disqualification of Judge Hamilton violated due process and equal protection under the law to the Tribes.

The jurisdiction of this Court is set forth in I CCOJ 202. This section reads as follows:

"The jurisdiction of the Court of Appeals shall extend to all appeals from final orders and judgments of the Tribal Court. The Court of Appeals shall review de novo all determinations of the Trial 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. The Court of Appeals, or the Chief Justice alone shall have jurisdiction:

"(a) to take all necessary steps to preserve and protect the jurisdiction of the Court (Emphasis Added);

"...."

This Court granted the appeal of the Tribes' interlocutory motion which requested a review of the disqualification of Judge Hamilton. In the June 9, 1989 order granting the appeal, this Court found it necessary to preserve and protect the jurisdiction of the Court because on November 8, 1988 there had been and continued to be problems with forum shopping by certain attorneys and lay counselors practicing in the Fort Peck Tribal Court system, this Court will address the same.

In opposing the interlocutory motion, Appellees and Appellee Lilley's attorney contend there is an absence of a case or controversy. Appellees' more specific contentions are it is not alleged that the defendants violated the provisions of Title I,

Section 307 when they requested the disqualification of Judge Hamilton; it is not alleged that the Tribes will be unable to have a fair trial before Judge Gourneau; and it appears that said interlocutory appeal has been filed in order to obtain an opinion declaring that Title I, Section 307 is unconstitutional. This Court agrees only with Appellees' contention it is not a violation of I CCOJ 307 to request the disqualification of Judge Hamilton.

The actions of Appellee Lilley's attorney in obtaining an ex parte order to disqualify a judge under I CCOJ 307 without notice to the other party and the tribal court's failure to make specific findings and give the Tribes an opportunity to be heard was error, and violated the codes of ethics, and denied basic due process of law, and equal protection under the law to the Tribes. The following will discuss the actions of Appellee Lilley's attorney and chief judge, and errors by the tribal court.

Appellee's counsel violated Canon 15, Code of Ethics for Attorneys and Lay Counselors of the Fort Peck Indian Reservation. Canon 15 reads in full as follows:

"An attorney shall not attempt to influence a judge or juror sitting on his or her case other than through authorized legal means. An attorney shall not privately confer with a judge concerning any case before that judge. Nor shall an attorney meet with a juror or prospective juror in a case that attorney is handling." (Emphasis Added).

On October 31, 1988, Appellees' counsel filed a motion with the chief judge to disqualify an associate judge. Appellees' also obtained an order on October 31, 1988 disqualifying the

associate judge. The Tribes' special prosecutor did not receive notice of a hearing or service of the motion and order until November 8, 1988.

The actions of the chief judge were in violation of Canon 3(A)(4), Code of Ethics for Judges and Justices of the Fort Peck Tribal Courts. In addition, Canon 3(A)(4) was violated. Canon 3(A)(4) reads in full as follows:

"A judge should accord to every person who is legally interested in a proceeding, or his lawyer or advocate, the full right to be heard under the Code, the Indian Civil Rights Act, and any other relevant source of law. Except as authorized by law, the judge shall not initiate nor accept any written or oral communication concerning a pending case, either from a party to the case or from any other person, without either the presence or agreement of all parties. The judge shall not meet with nay party to a case, or accept any communication from a party without either the agreement or presence of all other parties. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond. These restrictions do not include communications with other judges or with court personnel whose function it is to aid the judge in carrying out his judicial activities. (Emphasis added).

In the instant case, the chief judge accepted a written communication from another party (motion) without the presence or agreement of all parties in violation of Canon 3(A)(4), which is obvious from the Tribes' interlocutory motion. The record is not clear without a transcript of the October 31, 1988 hearing, however, when the order of disqualification was signed, the chief judge must have met with appellees and Appellee Lilley's attorney or at least the attorney without the presence of the Tribes'

special prosecutor.

As for the errors of the tribal court, it erred when it did not follow I CCOJ 307. This section reads as follows:

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

The tribal court's Order of Disqualification did not comply with I CCOJ 307 and gave no specific cause for the disqualification of Judge Hamilton other than, "Upon review of this matter, the Court finds that said motion should be granted."

Also, the tribal court erred and did not comply with I CCOJ 103. There is no transcript of the October 31, 1988 hearing where appellees' motion for disqualification was granted. Title I CCOJ 103 reads in full as follows:

"The Court shall keep a record of all proceedings of the Court (Emphasis Added), 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. A record of all proceedings

leading to incarceration shall be submitted to the Superintendent, Fort Peck Agency, to be made a part of the records of the Agency Office as required by 25 U.S.C. 200. Unless specifically excepted by this Code, the records of the Courts shall be public. In criminal cases, upon inquiry by members of the public, the Court shall furnish the name of the offender, the offense, and the sentence imposed."

It must be acknowledged I CCOJ 307 does not specifically require a hearing, however, the canons of ethics for attorneys and lay counselors and judges and basic due process and equal protection under the law demand a hearing. In establishing appropriate rules for a hearing, the chief judge has authority under I CCOJ 104 to establish rules of court by which it will decide motions filed under I CCOJ 307, and other sections of the codes. Title I CCOJ 104 reads as follows:

"The chief judge may prescribe written rules of court, consistent with the provisions of this Code, including rules establishing the time and place of court sessions. The rules shall be approved by the Tribal Executive Board before becoming effective."

This Court is not aware of any rules prescribed by the chief judge and approved by the Tribal Executive Board to deal with motions for the disqualification of a judge under I CCOJ 307. Therefore, this Court finds it necessary to direct the chief judge to prescribe written rules and have the same approved by the Tribal Executive Board consistent with the provisions of the CCOJ which will afford every party or the party's lawyer or advocate the full right to be heard.

In conclusion, an ex parte order in the tribal court is a clear violation of Canons of ethics basic due process and denies the party affected equal protection under the law. In addition,

the tribal court erred in disqualifying a tribal judge without making a proper finding of one of the specific reasons for disqualification under I CCOJ 307, providing both parties reasonable opportunity to be heard on the disqualification and making a proper recording of the hearing. Because Chief Judge McClammy is now deceased and Judge Gourneau is no longer an associate judge, this issue requires no remedy other than remanding this matter to tribal court for a trial before the presently acting tribal judges.

II.

Whether the time consumed by this appeal should be counted against the Tribes for 'speedy trial' considerations.

In this matter, Appellees and Appellee Lilley's attorney were responsible for an ex parte order which violated canons of ethics and denied basic due process of law and equal protection under the law to the Tribes; and from which the Tribes' special prosecutor filed an interlocutory motion requesting an appeal. To determine what party the time consumed by this appeal should be counted against, this Court will look at two general rules of law applied to speedy trial issues under the U.S. Constitution and apply the rules in the following legal analysis.

The first general rule of law discusses the principles or factors to be applied in determining if the accused has been denied his constitutional right to a speedy trial. The general rule of law reads as follows:

"Certain general principles or factors that have been recognized as applicable in determining whether as

accused has been denied his constitutional right to a speedy trial in a federal criminal proceeding have been referred to by the United States Supreme Court in making such a determination regarding a state criminal proceeding. The court, in the case referred to, recognized that the constitutional guaranty of a speedy trial is an important safeguard: to prevent undue and oppressive incarceration prior to trial; to minimize anxiety and concern accompanying public accusation, and; to limit the possibilities that long delay will impair the ability of an accused to defend himself. Adhering to the views expressed in earlier decisions, the court reiterated that the right to a speedy trial is necessarily relative; that it is consistent with delays; that whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon the circumstances.

"In a later case, the Supreme Court stated that, in addition to the general concern that all accused persons should be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. Under this principle, a claim that an accused has been denied his right to a speedy trial is subject to a balancing test, which must be applied on an ad hoc basis, in which the conduct of both the prosecution and the defendant are weighed. Some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right to a speedy trial are the length of the delay, the reason for the delay, the defendant's assertion of this right or failure to assert such right, and prejudice to the defendant from any resulting delay." 21 Am. Jur.2d, Criminal Law Section 654.

The second general rule of law is as follows:

"An accused cannot generally take advantage of a delay in being brought to trial where he was responsible for the delay either by action or inaction. Thus, an accused may not, for example, complain of any abridgement of his right to a speedy trial where the delay in questions is caused by his unlawful flight from prosecution." 21 Am. Jur.2d, Criminal Law Section 659.

Before this Court will apply the second general rule of law and weigh the conduct of both the prosecution and the defendant, the factors under the first general rule of law this court will

assess are the length of the delay, the reason for the delay, and defendant's assertion of this right or failure to assert such right and prejudice to the defendants from the delay.

First, the length of the delay has been less than a year. Second, the reasons for the delay is the conduct of appellees and Appellee Lilley's attorney. The fact the delay was the conduct of appellees is most significant in finding there is no violation of appellees' rights to a speedy trial under the Indian Civil Rights Act in the instant case.

Finally, Appellees asserted their right to a speedy trial in Appellee Lilley's Motion to Deny Interlocutory Appeal Filed by Prosecution, where they claim a denial of rights because the prosecutor's refused to stipulate that the time consumed on the appeal would be counted for 'speedy trial' considerations. However, there was no specific contention of prejudice to appellees as a result of the delay and this Court finds none in the record before it.

In further justifying attributing the delay to appellees' and Appellee Lilley's counsel, a review of Canon 13 of Code of Ethics for Attorneys and Lay Counselors of the Fort Peck Reservation places certain obligations on an attorney. Although the chief judge committed certain errors, these errors are also the responsibility of appellees and Appellee Lilley's attorney. Appellee Lilley's attorney was obligated to act with honesty toward the chief judge. This canon reads as follows:

"An attorney shall act with honesty toward the Fort Peck Courts. An attorney shall not knowingly make

false statements to the Courts or knowingly offer false evidence. Nor shall an attorney fail to disclose significant legal authority directly adverse to his or her client's position (Emphasis Added.)"

Appellee Lilley's attorney violated this cannon and should never have obtained an ex parte order disqualifying an associate judge without advising the Court of the canons of ethics which prohibit ex parte written or oral communications with tribal judges and which require all parties be afforded the full right to be heard under the CCOJ.

In conclusion, appellees and Appellee Lilley's attorney acted inappropriately and violated canons of ethics. Appellees and attorney were instrumental in the denial of basic due process and equal protection under the law to the Tribes which resulted in an interlocutory motion requesting an appeal of the ex parte motion and resulting order. Therefore, the time for the delay is attributed to appellees' and Appellee Lilley's attorney and a resulting trial will not violate appellees' rights to a speedy trial under the Indian Civil Rights Act under the circumstances in this case and present Tribal code.

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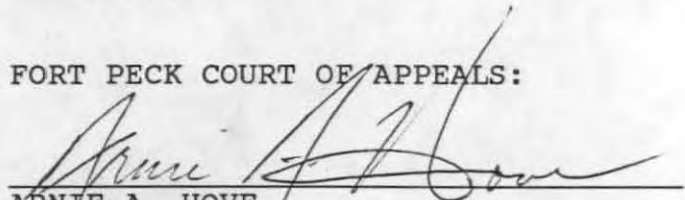
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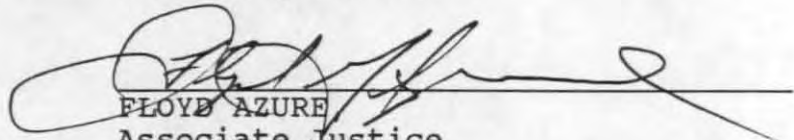
IT IS THE UNANIMOUS DECISION OF THIS COURT THE EX PARTE ORDER DATED OCTOBER 31, 1988 WHICH DISQUALIFIED THE TRIBAL JUDGE WITHOUT THE NECESSARY FINDING IN I CCOJ 307, AND PROVIDING BOTH PARTIES REASONABLE OPPORTUNITY TO BE HEARD ON THE MATTER VIOLATED BASIC DUE PROCESS AND DENIED THE TRIBES EQUAL PROTECTION UNDER THE LAWS TO THE TRIBES. THE CHIEF JUDGE IS DIRECTED TO PRESCRIBE WRITTEN RULES AND TO DEAL WITH DISQUALIFICATIONS UNDER I CCOJ 307 AND PRESENT THEM TO THE TRIBAL EXECUTIVE BOARD FOR APPROVAL WITHIN THIRTY (30) DAYS, IF POSSIBLE. THIS MATTER IS REMANDED TO TRIBAL COURT FOR A TRIAL WITHIN TWENTY (20) DAYS OF THE FILING OF THIS OPINION.

DATED this 3rd day of October, 1989.

FORT PECK COURT OF APPEALS:


ARNIE A. HOVE,
Chief Justice


GARY JAMES MELBOURNE,
Associate Justice


FLOYD AZURE
Associate Justice