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

SRE, a Minor Child,
Appellant/Defendant,

vs.

Appeal No. 087

FORT PECK ASSINIBOINE AND SIOUX TRIBES,
Appellee/Plaintiff

THIS APPEAL is from a final order dated August 30, 1989 rendered by the Honorable Terry L. Boyd, Associate Judge, requiring SRE to report for blood tests and out-patient treatment.

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: 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; A PETITION MUST BE FILED AGAINST A JUVENILE FOR AN ALLEGED CRIMINAL CONTEMPT; AND A JUVENILE IS ENTITLED TO DUE PROCESS AND THEREFORE THE TRIBAL COURT MUST FOLLOW THE PROCEDURE SET FORTH IN TITLE V OF THE CCOJ.

Argued: November 30, 1989 Decided: November 30, 1989

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

HELD: SRE WAS DENIED DUE PROCESS WHEN THE COURT FAILED TO RECORD THE PROCEEDINGS AS REQUIRED BY I CCOJ 103 AND ACTED WITHOUT THE FILING OF A PETITION AS REQUIRED BY V CCOJ 301 AND THE GIVING OF NOTICE AND A HEARING AS REQUIRED BY V CCOJ 305 AND 306. THEREFORE, THE ORDER OF AUGUST 30, 1989 AND ANY CHARGES OF CRIMINAL CONTEMPT AGAINST APPELLANT ARE DISMISSED FOR THE TRIBAL COURT'S FAILURE TO FOLLOW THE TRIBAL CODE.

FACTS:

On August 30, 1989, SRE, a minor child, was alleged to have violated III CCOJ 410. No petition was filed against SRE.

On August 30, 1989, a hearing was held in which Terry L. Boyd as juvenile judge signed an order. The order stated SRE appeared with her mother, Vera Red Elk, and Melissa Melton as counsel. The order then stated, "IT IS ORDERED that (SRE) be released to her mother pending further proceeding on a Contempt of Court charge, said Minor Child is ordered to report to the BIA Detention Center on alternate days to submit to a breath test, said child is ordered not to use alcohol or drugs during her release, said child is ordered to make contact with Spotted Bull Treatment Center to make arrangements for out—patient alcohol treatment and report said treatment to this Court for review."

There was no transcript of the August 30, 1989 hearing at which the order was issued. In addition, the record does not reflect where any petition was filed pursuant to V CCOJ 301 or findings of fact were made by the judge at a V CCOJ 305(a) hearing, if that was what the hearing held on August 30, 1989 was intended for.

SRE's mother filed a Petition for Review on September 13, 1989. The issues raised by the petition and to be addressed by this Court are as follows:

1. Whether SRE's due process rights were violated by the Tribal Court's procedures and failure to make an electronic recording of the August 30, 1989 hearing.
2. Whether SRE's rights were violated by the Tribal Court's order of August 30, 1989.

I.

In addressing issue no. 1, the Court has determined SRE's due process rights were violated by the Tribal Court's procedures and failure to make an electronic recording of the August 30, 1989 hearing.

This Court held oral arguments at which Judge Boyd was asked to appear since this Court had an incomplete file and there was no transcript of the August 30, 1989 proceedings. Judge Boyd took obvious offense to this Court's request he appear which resulted in an attempt to disqualify Justice Melbourne and Justice Hove. The portion of the transcript where Judge Boyd asked the Special Prosecutor to request the disqualification of the justices and the motion was properly denied went as follows:

- Ron Arneson: Your Honor, at this time, with due respect to the Court, um..., Judge Boyd requests that... that you, Mr. Hove, and you Mr. Melbourne, be disqualified for reasonable belief of possible bias prejudice.
- Justice Melbourne: On what grounds? Be specific.
- Ron Arneson: His contention is that that there is a possibility as it relates to you two persons, in terms of adjudging this case unfairly because of previous hearings involving this judge.
- Justice Hove: Okay, Counsel. Do you agree that Title 1, Section 307, rules and governs the disqualifications of the justice or judge.
- Ron Arneson: I do, your Honor.

Justice Hove: Now this statute reads specifically: A Justice or Judge shall be disqualified in any proceeding in which his or her impartiality might reasonably be questioned in which he/she has any personal bias or prejudice concerning any party. Mrs. Red Elk, have you ever met me?

Linda Red Elk: No.

Justice Hove: Have you ever met Justice Melbourne.

Linda Red Elk: No.

Justice Hove: Have you ever discussed with any one of us, this case.

Linda Red Elk: No.

Justice Hove: On that grounds, we throw that out. If she has any personal bias or prejudice concerning any party in which he/she, a member or his immediate family, might be a witness, has any interest, or has any personal knowledge to be disputed evidentiary facts concerning the proceedings. On that grounds with the two questions that we asked, we throw it out. Um..., Or has acted or is acting as his lawyer or lay counselor in the proceeding. If I acted ever as your lawyer or your law counselor in any proceeding.

Linda Red Elk: No.

Justice Hove: With any member of your family.

Linda Red Elk: No.

Justice Hove: Has Justice Melbourne?

Linda Red Elk: No.

Justice Hove: Or in which he/she might otherwise appear to be biased or prejudiced. Your motion, will not come from this Justice, but will come from the sole remaining Justice that has not asked to be disqualified. Justice Azure, you've heard the testimony of that witness. She's not under oath. Um..., you are aware of the statute. Do you rule that these two Justices should be disqualified.

Justice Azure: No, I don't. I don't feel they should be.

Justice Hove: The motion is denied. Proceed.

[Transcript p. 15, 1. 24 to p. 17, 1. 20.]

After the above exchange, the proceeding continued. However, before delivering the unanimous decision of this Court, the justices also asked the special prosecutor and SRE's counsel their position regarding the motion for the disqualification of Justice Melbourne and Justice Hove. This portion of the transcript reads as follows:

Justice Hove: Prosecutor Arneson, in your review of the Disqualification Provision of this Statute, and the questions that were asked of the other party....the fact that (sic) the Tribes are the second party. Do you see a basis for..for.....for the granting of your motion?

Ron Arneson: Your Honor, that.... I, I... I don't have information other than that which was provided by Judge Boyd.

Justice Hove: Okay. But, let me ask you this, Counsel. Have you any reason to believe that Justice Melbourne or myself to be biased or prejudiced in delivering an opinion on the facts in this case.

Ron Arneson: I have no personal knowledge of that, your Honor. I..., I.... I can only say that that is the information that was given to me by Judge Boyd.

Justice Hove: And in all other proceedings despite who the parties are, have you ever felt that the Justices here... sitting before you, would be biased or prejudiced in any of those proceedings.

Ron Arneson: Your Honor, I... You know, I would have to answer that the court has in my opinion never dealt with the Tribes unfairly or in a biased manner that I am aware of.

Justice Hove: And tht (sic) is the party....

Ron Arneson: That is a personal reference (sic).

Justice Hove: Okay. And that is the party in this case.

Ron Arneson: It's not a Tr....I'm.... It's important to me to get this on the record. It is nor a Tribal reference (sic). It is a personal reference (sic).

Justice Hove: Okay. Um..., Melissa Melton, do you feel that at any time that this court in all the cases.... now this court has ruled against you...

Melissa M. Schauer: Yes it has.

Justice Hove: Has ever been biased or prejudiced toward you or any of your parties.

Melissa M. Schauer: No, Sir. I can honestly say that I don't feel that way.

[Transcript p. 33, 1. 1 to p. 34, 1. 9.]

As is obvious from the above, under I CCOJ 307 this Court acted properly on the motion for disqualification when denying the same and proceeding with arguments.

This Court then proceeded to hear arguments on the issues of proper procedure and an electronic recording. During arguments, it was determined there was no electronic recording of the August 30, 1989 proceeding. The special prosecutor and Judge Boyd were advised of I CCOJ 103 and asked their position on recording proceedings. The portion of I CCOJ 103 they were advised of read as follows:

"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...."

When asked his position on the electronic recording, it was the special prosecutor's position the recording was required. It was Judge Boyd's position he did not have to record proceedings regardless of I CCOJ 103 and the special prosecutor's position the same was required. The applicable portions of the transcript read as follows:

Ron Arneson: Would you, would the court read the specific language.

Justice Hove: The court shall keep a record of all proceedings (sic) of the court showing the Title of the case, etc. The name of the Judge, the Findings of the Court, or Verdict of the Jury and the Judgment. Preservation of testimony for perpetual memory by electronic recording or otherwise together with any of the facts or circumstances deemed or importance to the case. And, I've... I've jumped you know... a little bit in there. Is there not to be electronic recordings of all proceedings?

Ron Arneson: um..., yes, Your Honor.

Justice Hove: Okay. By Statute, that's required. That's mandated. It's nothing you have an option of, as prosecutor, and you have no right to waive, neither does the Judge or anybody else. That is what a party is entitled to. Is that no correct?

Ron Arneson: That's correct, Your Honor.

Justice Hove: Now, we have no electronic recording of the August 30th, 1989, proceeding. Is that correct?

Ron Arneson: To my knowledge, we do not, Your Honor.

This Court held an extensive conversation with Judge Boyd to determine what really happened on August 30, 1989. Judge Boyd took offense towards two of the justices and the proceedings when it was stressed to him that it is incumbent upon the Tribal Court to keep a record of all proceedings and preserve the testimony at all proceedings as required by the Tribal Code. As previously discussed, Judge Boyd went so far as to request the disqualification of two of the justices and that the proceedings be continued. The portions of the transcript where Judge Boyd refused to follow the Tribal Code, admitted there was no electronic recording or petition and/or requested a continuance reads as follows:

Justice Hove: Don't you think as a Judge, though.... a Tribal Court judge. in order to avoid allegations of procedural errors and constitution. . .and violations of constitutional rights Number one— Every proceeding as required by the Code, whether in your chambers or elsewhere, should be recorded. I mean, to protect you.

Judge Boyd: I don't believe so.

[Transcript, p. 23, 1. 22 to p. 24, 1. 4.]

Justice Hove: Okay. We have all the other charges the other petition. We're not referring to that.... We're talking about that one case, that one situation. You don't have a petition or you do.

Judge Boyd: There was never one filed because of the situation was that she turned of age, and you can't charge her with as far as I know, a juvenile petition when she is no longer a juvenile.

Justice Hove: Is there an electronic recording that you're going to provide this court with.

Judge Boyd: No. There isn't.

Justice Hove: Then the motion for continuance will be properly dis... denied. And this court wil....

[Transcript, p. 30, 1. 10-16.]

Justice Hove: Do you feel it was appropriate to proceed without an electronic recording. You feel it was appropriate to proced (sic) without a petition for criminal contempt.

Judge Boyd: That's correct.
Justice Hove: Totally in violation of the Code section.
Judge Boyd: That's correct.

[Transcript, p. 31, 1. 13-18.]

In addition to the above, because SRE has raised the issue of improper procedures at the August 30, 1989 hearing, this Court is limited in its review of the actions of the Tribal Court without the complete record required by I CCOJ 103. This Court is required to review the record and determination of the Tribal Court according to the extent of its jurisdiction set forth in I CCOJ 202. Title I CCOJ 202 reads in part 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 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 SRE'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 of the Tribal Court to make the proper record and electronic recording required by I CCOJ 103. Therefore, this Court can only review the procedures followed by the Tribal Court as to what documents are present in the file and will address this further in its discussion of issue no. 2.

In conclusion, Appellant has alleged improper procedures. Because of the lack of a record and recording of the proceedings as required by I CCOJ 103, this Court has no choice but to find for SRE. Therefore, the Tribal Court did not follow procedures as alleged by SRE and established by the Tribal Code.

II.

In addressing issue no. 2, SRE's rights were violated by the Tribal Court's August 30, 1989 order. Before the entering of an order, as a juvenile SRE is entitled to due process as provided under Title V of the CCOJ.

Under V CCOJ 301, SRE was entitled to the filing of a petition before subjecting her to the jurisdiction of the court. 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. After the filing of the required petition, SRE was entitled to due process as provided for in V CCOJ 305. This section reads as follows:

"(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". As admitted in portions of the transcript previously set forth, there was no petition presented to the Tribal Court. Despite the lack of a petition, the Tribal Court acted on its own without following any of the procedures in V CCOJ 305. In no situation can the Tribal Court act contrary to the Tribal Code in a juvenile matter and expect a juvenile, their parent and lay counselor to come into Tribal Court and participate in a juvenile proceeding where criminal contempt is alleged.

Because the record is not clear, this Court finds the in the instant case may not have been in the best interests of the child. Title V CCOJ 306 controls the procedure for conducting a dispositional hearing and determining the best interests of the child. This section reads in part as follows:

"(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;

"(i) to the custody of the parent of guardian subject to such counseling, treatment, or other services as are deemed necessary to keep the child in the home;

"(ii) to the custody of a person related by blood or marriage to the child on or off the Reservation;

"(iii) to the custody of an approved Indian foster care home;

"(iv) to the custody of the Hope Ranch or other approved institution (sic) on the Reservation; or

"(v) to the custody of a non-Indian foster care home or institution on or off the Reservation, provided that such home or institution shall not be used for delinquent children as well.

In addition, the Court may prescribe such counseling or treatment for the custodial parents as it deems necessary.

"...."

In addressing, the August 30, 1989 order, it does release SRE to her mother which is the first preference. The order also requires alcohol treatment and that the juvenile submit to a breath test on alternate days, however, there are no findings to support the requirements of the order.

In conclusion, this Court lacks an adequate record to properly review this case. Because there was no petition or notices of the dispositional hearing in the record, this Court must find the Tribal Court intentionally failed to comply with V CCOJ 306. Therefore, and because Appellant's due process rights were denied, dismissal of the August 30, 1989 order and any charges against SRE for criminal contempt is warranted and appropriate in the instant case.

IT IS THE UNANIMOUS DECISION OF THIS COURT THAT SRE WAS DENIED DUE PROCESS WHEN THE COURT FAILED TO RECORD THE PROCEEDINGS AS REQUIRED BY I CCOJ 103 AND ACTED WITHOUT THE FILING OF A PETITION AS REQUIRED BY V CCOJ 301 AND THE GIVING OF NOTICE AS REQUIRED BY V CCOJ 305 AND A HEARING AS REQUIRED BY V CCOJ 306. THEREFORE, THE ORDER OF AUGUST 30, 1989 AND ANY CHARGES OF CRIMINAL CONTEMPT AGAINST SRE ARE DISMISSED FOR THE TRIBAL COURT'S INTENTIONAL FAILURE TO FOLLOW THE TRIBAL CODE.

R E C O M M E N D A T I O N

The members of the Reservation Safety Committee should review Associate Judge Terry L. Boyd's actions in the instant case since they appear to involve a knowing and an intentional refusal to follow the Tribal Code and procedures required therein.

DATED this _____ day of January, 1990.

BY THE COURT OF APPEALS:

Arnie A. Hove, Chief Justice

Gary James Melbourne, Associate Justice

Floyd Azure, Associate Justice
