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

FORT PECK TRIBES,
Plaintiff/Appellant

Appeal No. 177

VS.

MEMORANDUM OPINION and

DONNA JO LINDSAY,
Defendant/Appellee.

ORDER OF REMAND

THIS MATTER comes before the Fort Peck Court of Appeals on a joint motion for an order to show cause brought by counsel for the Fort Peck Tribes Emmett Buckles and counsel for Defendant Mary L. Zemyan. The motion for order to show cause was directed to Judge Leland Spotted Bird. The Appeals Court received written memorandums from counsel filing the joint motion, and from Judge Spotted Bird. The Court also heard oral arguments on January 22, 1993.

FACTS

Defendant Donna Jo Lindsay was scheduled to go to trial on November 18, 1992 on a charge of unlawful production, sale, or possession of drugs, Title III Sub. B, Section 405 CCOJ. On the day of trial the Prosecutor and counsel for Defendant met and entered into a plea agreement, wherein Defendant would plead guilty to the charge, and a sentence below the statutory minimum was agreed upon and recommended to the Court. **REF. Transcript** November 18, 1992, page 1. The terms of the agreed upon sentence recommendations were recited into the record (TR., Supra, page 1-4, incl.) and accepted by the Court (TR., Supra, page 4). On the same date, Judge Spotted Bird vacated the order to accept the guilty plea and sentence recommendations, and remanded the case back to the Prosecutor for prosecution. The basis for the order to vacate was the review by the Court of the mandatory sentence provision of the charge. **REF. Order to Vacate.**

The joint motion for order to show cause followed.

ISSUE: The basic issue is whether the Court erred in accepting the plea agreement which included a sentence recommendation below the statutory minimum sentence.

HELD: The Court erred in accepting plea agreement which included a sentence recommendation below the statutory minimum.

DISCUSSION

The issue of downward departure from statutory minimum sentences is not addressed specifically in the CCOJ and we therefore refer to federal law on the matter.

Under Title 28, U.S.C. (**Judiciary and Judicial Procedures**), a sentencing guideline commission is established and its duties defined. Referring to 28 U.S.C. §994(n), we find the following language.

(n) "The Commission shall assure that the guidelines reflect the general appropriateness of imposing a lower sentence that would otherwise be imposed, including a sentence that is lower than established by statute as a minimum sentence, to take into account a defendant's substantial assistance. The investigation or prosecution of another person who has committed an offense."

The downward departure based on "substantial assistance" is addressed in the sentencing guidelines (U.S.S.G.) § 5K1.1 as follows:

"Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the Court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the Court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the Court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance."

We conclude that the Court may impose a sentence downward from a statutory minimum, but the Court should have before it a motion to do so, and make findings on the record with a consideration of the at least some of the factors stated in U.S.S.G. §5K1.1., or other comparable findings. At a minimum, the record should reflect the fact of the statutory minimum, and the reasons for departure therefrom.

Accordingly, IT **IS HEREBY ORDERED** as follows:

- 1. The matter is remanded to the Fort Peck Tribal Court for the following:
 - a. rehearing on the plea agreement and sentencing provisions, or
 - b. withdrawal of the guilty plea by and trial.

DATED this _____ day of March, 1993.

BY THE COURT OF APPEALS:

GERARD M. SCHUSTER

DEBRA A. JOHNSON

FLORENCE YOUPEE
