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FORT PECK
TRIBAL COURT OF APPEALS

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

Fort Peck Tribes, Appellee v. Ronnie Smith Sr., Appellant.	CAUSE NO. AP # 801 ORDER AFFIRMING EXCLUSION ORDER
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Appeal from the Fort Peck Tribal Court, Lonnie Headdress, Presiding Judge.

Appellant Ronnie Smith, appearing pro se.

Appellee Fort Peck Tribes appearing through David Mrgudich, Tribal Prosecutor

Before E. Shanley, Chief Justice; B. Desmond, Associate Justice; and B.J. Jones, Associate Justice.

BACKGROUND

¶ 1 This matter comes before the Fort Peck Court of Appeals (FPCOA) on a Petition for Review filed by Appellant seeking to overturn the February 21, 2020 order of Judge Headdress excluding the Appellant for five years from the Fort Peck reservation pursuant to Title 3, Chapter 7 of

the Fort Peck Tribal Code. Appellant requests review of the order claiming that he was denied the right to effective assistance of counsel and that the exclusion order was not warranted. The Tribes oppose the appeal and have submitted a brief in support of the Tribal Court's exclusion order.¹

¶ 2 Pursuant to a Resolution of the Fort Peck Tribal Council, Resolution #30-147-2019-12, the Fort Peck Tribal Council went on record to exclude the Appellant from the Fort Peck Reservation. Pursuant to Title 3-701 of the Fort Peck Comprehensive Code of Justice, the Tribes through its prosecutor's office filed a petition with the lower Court seeking to enforce the banishment. The Appellant was served with the petition and appeared before the Tribal Court for an advisement of his rights on February 6, 2020. At that time he indicated that he intended to challenge the petition and that he wished to retain counsel. The Court adjourned the matter to February 18, 2020 to permit the Appellant to retain counsel. He appeared at that hearing without counsel and the Court proceeded to hear the evidence and issued its order on February 21, 2020 upholding the banishment. The Appellant then indicated he intended to appeal and the Court below thus stayed the execution of the banishment order pending appeal.

¹ Judge Headdress had stayed the banishment order pending appeal so the Appellant has not been subjected to the order as of the date of this decision.

¶ 3 The Appellant is a tribal member who has committed a series of criminal offenses on the Fort Peck reservation in the past including “violence and the selling of drugs and drug use” on the reservation. Tribal Court Finding of Fact 4. The Court concluded that these offenses did “threaten the life, safety and health of the member of the reservation.” Because of this past history the Fort Peck Tribal Council issued Resolution #30-147-2019-12 to exclude the Appellant from the Fort Peck Reservation. Under Title 3, Chapter 7 of the Fort Peck Tribal Code, the Prosecutor for the Tribes filed an action in the Tribal Court to enforce the exclusion order. That Code Section states that:

Sec. 701. Grounds for Exclusion.

Any person may be excluded from the Reservation for:

(a) Conduct which substantially threatens the life, the physical health or the safety of an Indian or Indians residing on the Reservation.

(b) Conviction in Tribal Court of at least three felonies or Class A Misdemeanors which involve acts of violence against persons under the laws of the Tribes.

¶ 4 The Tribal Prosecutor then brought an action to exclude the Appellant from the reservation pursuant to the Resolution. The Appellant was provided one continuance to retain counsel but he failed to do so and after the hearing was excluded for ten years, with the possibility of review of the exclusion after five years. On appeal he argues he was denied the right to court-appointed counsel and the exclusion was for conduct that occurred years ago and that he was a changed man. Appellant further

asserts that his criminal record in Tribal Court does not meet the requirements of 701(a) and (b) for exclusion.

¶ 5 On March 12, 2021, Appellant submitted a Response to the Appellee's brief and indicated he did not receive this Court's Order setting the briefing schedule. However, this Court received a certificate of service issued by the Clerk of the FPCOA indicating that he was served the Order Granting the Appeal and Establishing a Briefing Schedule on September 8, 2020.

STATEMENT OF JURISDICTION

¶ 6 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The order excluding the Appellant for ten years constitutes a final order even though it was stayed pending appeal.

STANDARD OF REVIEW

¶ 7 This Court reviews de novo all determinations of the lower 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. 2 CCOJ §202.

ISSUE

¶ 8 1. Did the Tribal Court err by denying the Appellant court-appointed counsel in his exclusion hearing and by excluding him from the Fort Peck reservation for ten years?

¶ 9 2. Was the Appellant provided due process of law prior to his exclusion?

DISCUSSION

¶ 10 This Court considers this to be an appeal of the utmost importance because it involves the use of the power of exclusion which carries with it the interference in the exercise of numerous rights including the right to participate in cultural and spiritual practices of the Tribes. It will thus take this opportunity to examine whether the current exclusion ordinance of the Tribes comports with the Indian Civil Rights Act, 25 USC §1301 et seq., as well as the customs and practices of the Tribes of the Fort Peck Reservation, and whether the exclusion order below met the standard of the Fort Peck Tribal Code.

¶ 11 The federal courts have recognized the inherent rights of Indian tribes to exclude members and non-members from their reservations. See Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-45, 102 S. Ct. 894, 71 L. Ed. 2d 21 (1982) (recognizing a tribe's inherent authority to exclude

non-Indians from tribal land, without applying Montana); see also [Atkinson Trading Co. v. Shirley, 532 U.S. 645, 654, 121 S. Ct. 1825, 149 L. Ed. 2d 889 \(2001\)](#) (holding that the Navajo Nation's power to tax, derived in part from its power to exclude, should be considered under Montana because, unlike in Merrion, the incidence of the tax fell "upon non-members on non-Indian fee land"); [Bourland, 508 U.S. at 689](#) (noting that Montana established that "when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands"); [Merrion, 455 U.S. at 144-45](#) ("Nonmembers who lawfully enter tribal lands remain subject to the tribe's power to exclude them. . . . When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its ultimate power to oust the non-Indian as long as the non-Indian complies with the initial conditions of entry." (emphasis in original)); [Montana, 450 U.S. at 557](#) (recognizing a tribe's inherent authority to condition the entry of non-Indians on tribal land as a separate matter from whether a tribe may condition the entry of non-Indians on non-Indian land); Cohen's Handbook of Federal Indian Law § 4.01[2][e], 220 (Nell Jessup Newton et al. eds., 2005) [hereinafter Cohen] (explaining that "[b]ecause the exclusionary power is a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity

and order of its territory and the welfare of its members, it is an internal matter over which the tribes retain sovereignty"); cf. Atkinson Trading Co., 532 U.S. 645, 121 S. Ct. 1825, 149 L. Ed. 2d 889 (holding that the Navajo Nation's power to exclude did not allow it to tax non-Indians on non-Indian fee land (emphasis added)); see also Hardin v. White Mountain Apache Tribe, 779 F.2d 476 (9th Cir. 1985).

¶ 12 Several courts have held that exclusion is such a severe deprivation that it rises to the level of "detention" under 25 USC §1303 of ICRA that authorizes a person to challenge his "banishment" in federal court under the provisions of 25 U.S.C. §1303, permitting federal court review of tribal court actions under the Indian Civil Rights Act. The first court to rule such was the United States Court of Appeals for the Second Circuit in Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996) in which the federal court of appeals reversed a lower court's order dismissing a habeas corpus challenge to a banishment of certain Seneca Indians. The Court did not address whether a Tribe could banish its own members consistent with the Indian Civil Rights Act, but only that federal courts could review such banishments. In one unreported federal court decision, Sweet v. Hinzman, 2009 U.S. Dist. LEXIS 36716 (W.D. Wash. 2008) a federal court held that the banishment and disenrollment of

certain tribal members violated the Indian Civil Rights Act. However, that case seems to turn on procedural due process violations and not on the ground that the Tribe involved therein had no right to banish its own members. The fact that the Court ruled that banishment could only be accomplished when due process is afforded, however, is relevant to the analysis this Court undertakes later in this decision in regard to the particular provisions of the banishment ordinance being reviewed herein.

¶ 13 The right to exclude has been recognized by Congress as a potential inherent remedy available to Tribes to permit them to enforce provisions of domestic violence protection orders. See 18 USC §2265(e).² Thus, it appears that even the United States by statute recognizes that Indian tribes may exclude certain violent persons from their communities.

¶ 14 It is important to note however that in order to lawfully exclude a person an Indian tribe has to give notice to those persons whom may be subject to exclusion with clarity what may constitute grounds for exclusion. Ordinances that may have a chilling effect on the exercise of free speech or

² (e) Tribal Court Jurisdiction.—

For purposes of this section, a court of an Indian tribe shall have full civil jurisdiction to issue and enforce protection orders involving any person, including the authority to enforce any orders through civil contempt proceedings, **to exclude violators from Indian land**, and to use other appropriate mechanisms, in matters arising anywhere in the Indian country of the Indian tribe (as defined in section 1151) or otherwise within the authority of the Indian tribe.

religious freedom rights, or those that attempt to punish conduct, must clearly define that conduct which may result in penalties being imposed, or rights denied, in order to satisfy due process of law. Otherwise persons are not put on notice of what behavior may result in the denial of their freedoms or rights. In addition, if no standards are laid out in the law persons may be subjected to arbitrary enforcement of the law based upon the personal predilections of each Judge that may hear a case. One Judge may feel, for example, that drug use is having such a deleterious impact on the tribal community that such use justifies banishment, while another may feel that such a remedy is an overreach for drug activity. It is therefore up to the Fort Peck Tribal Council to define for the Tribal Court when banishment would be appropriate to avoid conflicting value judgments. This doctrine is referred to as the "overbreadth" or void for vagueness doctrine. Although they are distinct concepts, overbreadth and vagueness challenges are closely related in the principles they vindicate, and courts often discuss them together.³

³ See, e.g., [Kolender v. Lawson](#), 461 U.S. 352, 358 n.8, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (explaining that courts have "traditionally viewed vagueness and overbreadth as logically related and similar doctrines"); [NAACP v. Button](#), 371 U.S. 415, 432-33, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963); [Adamian v. Jacobsen](#), 523 F.2d 929, 933 (9th Cir. 1975) ("The closely related first amendment doctrines of vagueness and overbreadth permit a defendant to assert the invalidity of a statute because of its potential encroachment on first amendment freedoms, even in cases where the defendant's conduct itself is unprotected by the first amendment.").

The void-for-vagueness doctrine is rooted in the basic guarantees of due process, a concept incorporated both into the Indian Civil Rights Act and the underlying premise of fairness set out in the Fort Peck Tribal Code.

The void for vagueness doctrine requires that a statute punishing conduct define the conduct with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, the United States Supreme Court has recognized that the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine - the requirement that a legislature establish minimal guidelines to govern judicial officers attempting to enforce them. See Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); Williams, 128 S. Ct. at 1845; Smith v. Goguen, 415 U.S. 566, 572-73, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974).

The void-for-vagueness doctrine is premised on the notion that [v]ague laws offend several important values. First, because we assume that a person is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws

may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Viewed in that light, this Court concludes that the Appellant was not denied due process of law when he was excluded from the Fort Peck reservation. The ordinance clearly defines what conduct may lead to exclusion. Although Appellant argues that his record did not contain the required number of convictions listed in 3 CCOJ 701(b), the Tribes do not have to meet the requirements of that subsection if exclusion is based on the fact that Appellant engaged in conduct which substantially threatens the life, the physical health, or safety of Indians residing on the Reservation pursuant to Section 701(a).

¶ 15 The ordinance permits the Tribal governing body to enact a resolution to exclude, but then requires the Tribal Court to conduct a due process hearing prior to exclusion.⁴ The ordinance permits a person

⁴ Sec. 702. Initiation of Exclusion Proceedings. (a) Exclusion proceedings shall be initiated by **written charges of specific conduct** justifying exclusion made by the Tribal Civil Prosecutor or a member of the Tribal Executive Board. Such charges shall

subject to exclusion the right to retain counsel to represent him, but does not compel the Tribe to appoint counsel because the exclusion proceeding is not criminal in nature but instead is civil in nature. The process provided a person subject to exclusion is almost as broad as the rights provided persons who are subject to incarceration.⁵ In addition, an extra layer of due process is permitted in the form of an appeal to this Court prior to execution of the exclusion order, at least that is true for this case.

¶ 16 Because this Court finds that the Fort Peck exclusion ordinance comports with due process under the ICRA and the Tribal Court did not err

also include the text of a proposed exclusion order. The charges and order must then be adopted by a majority vote of the Tribal Executive Board at a meeting at which a quorum is present.

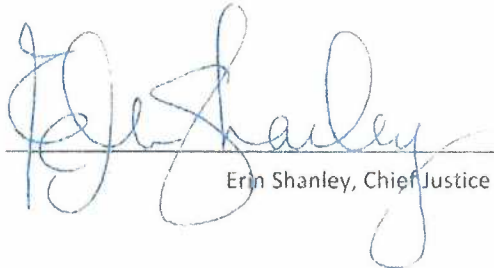
⁵ Sec. 704. Hearing on Charges. (a) Not less than 10 days after service of notice of charges pursuant to Section 703, the Tribal Court shall hold a public hearing on the charges. The charges must be proven by sworn testimony of witnesses and reliable documentary evidence. The person or persons charged shall be given the opportunity to answer the charges by written or oral presentation before the Court, and shall have the right to cross-examine witnesses, to present witnesses or evidence in defense against the charges and **to be represented by counsel at their own expense.** (b) After the hearing, the Court shall determine whether the charges have been proven by a preponderance of the evidence. If it determines the charges have been so proven, it shall adopt the exclusion order and set a date when the exclusion order shall take effect. If the Court determines the charges have not been so proven, it shall not adopt the exclusion order, and the charges shall be dropped. In either case, the decision of the Court shall be reviewable only in the manner provided for appeal of a final decision in a civil action by the Tribal Court of Appeals.

in proceeding to conduct a hearing even though the Appellant had not retained counsel this Court denies the appeal of Mr. Smith.

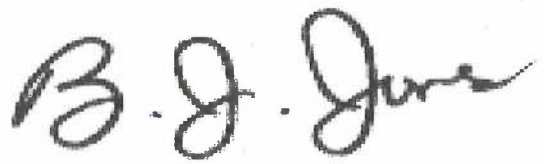
¶ 17 WHEREFORE IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Tribal Court's Order excluding the Appellant from the Fort Peck reservation for ten years is hereby AFFIRMED.

SO ORDERED the 7th day of January 2021.

FORT PECK COURT OF APPEALS


Erin Shanley, Chief Justice


Brenda Desmond, Associate Justice


Associate Justice