

FILED

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**FORT PECK
TRIBAL COURT OF APPEALS**

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

<p>Fort Peck Tribes, Appellee</p> <p>v.</p> <p>Yvette Lopez Appellant.</p>	<p>CAUSE NO. AP # 842</p> <p>ORDER REVERSING AND REMANDING</p>
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Appeal from the Fort Peck Tribal Court, Lonnie Headdress, Presiding Judge.
Appellant Fort Peck Tribes, represented by Prosecutor Marvin Youpee Jr.,
Appellee not Appearing
Before Justices E. Shanley and B.J. Jones.

BACKGROUND

¶ 1 This matter comes before the Fort Peck Court of Appeals (FPCOA) on an appeal filed by the Fort Peck Tribes from a September 21, 2022 order dismissing the charge of refusal to submit to a chemical test in violation of 17 CCOJ Section 108 for failure of the Tribes to charge out a violation of 17 CCOJ Section 107 (DUI) in that same complaint. For the reasons stated herein we find that the Court erred in dismissing the complaint because probable cause did exist for the arrest of the

Appellant for DUI and that is the only requirement for charging out a violation of 17 CCOJ Section 108, not evidence beyond a reasonable doubt.

FACTS

¶ 2 On July 23 2022, the Fort Peck Tribal Police stopped Ms. Lopez for speeding on Highway 2. When stopped the officers smelled a strong odor of alcohol in the car and when she got out of her vehicle her ability to walk was so impaired that she had to be physically guided to the officers' vehicle. When asked to submit to field sobriety tests and a chemical test of her breath however, she refused, and the officers did not pursue a search warrant for a chemical test. Ms. Lopez did not file a probable cause challenge to her stop or her arrest and in fact did not appear for he pre-trial. The Presiding Judge, however, after considering the matter opted to dismiss the charge of failure to submit to chemical testing because the Tribes failed to charge out the DUI in the same complaint. He equated this failure with the Tribes lacking probable cause to charge out DUI and thus found that the failure to submit to the tests could not be a separate criminal offense because the Tribes failed to charge out the DUI.

¶ 3 Ms. Lopez failed to appear for her pre-trial on September 21, 2022, and thus failed to raise the issue relied upon by the trial judge to dismiss the matter. Judge Headdress has submitted his position to the Court explaining that he dismissed the complaint sua sponte because he felt the Tribes did not have probable cause to charge the DUI and that such a charge is a legal predicate to charging out a violation of 17 CCOJ Section 108 .

¶ 4 The Tribes filed an appeal from the dismissal and submitted its brief on November 7, 2022. Ms. Lopez failed to submit a brief and the Court received the

presiding Judge's response on January 31, 2023. This Court thus finds that the appeal is ripe for resolution without oral argument.

STATEMENT OF JURISDICTION

¶ 5 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The Tribal Court Order dismissing the criminal charges with prejudice is a final order subject to appeal.

STANDARD OF REVIEW

¶ 6 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

¶ 7 Whether the Tribal Court erred when it dismissed a charge for violating 17 CCOJ Section 108 because the Tribes did not charge the Defendant with the corresponding charge of DUI.

DISCUSSION

- I. **THE COURT ERRED WHEN IT DISMISSED THE CHARGE OF VIOLATING 17 CCOJ Section 108 BECAUSE THAT CHARGE ONLY REQUIRES PROOF THAT THE TRIBAL OFFICERS HAD PROBABLE CAUSE TO ARREST THE DEFENDANT FOR DUI AND NOT EVIDENCE BEYOND A REASONABLE DOUBT**
 - A. **The Tribal Court failed to receive a motion from the Defendant challenging probable cause for the arrest and although the Court has an independent obligation to assess probable cause, the record establishes probable cause for the arrest.**

¶ 8 The decision to pursue a DUI prosecution is based upon the Tribes' assessment whether it can prove the case beyond a reasonable doubt, whereas the basis for the arrest of a DUI suspect is probable cause. The Court would agree with the


presiding Judge in this case that if the Tribal officers lacked any suspicion to believe the Defendant was impaired while driving they would not have had the right to ask her to submit to sobriety tests and a chemical test of her breath. The fact that the Tribes decided not to proceed with the DUI charge, apparently because the Defendant refused to submit to testing or a chemical test to prove her level of intoxication, does not prevent the Tribes from charging out the failure to submit to testing as that is a separate offense that is not tied directly to the DUI charge. Similar to Fort Peck, 12 States criminalize refusal to submit to chemical testing: Alaska, Arkansas, Florida, Kentucky, Louisiana, Maine, Nebraska, North Dakota, Ohio, Rhode Island, Vermont, and Virginia. However, most States have requisites such as prior convictions, or the conviction of refusal is an aggravating factor., whereas Fort Peck does not have a similar factual or legal predicate.

¶ 9 Here, the Court apparently construed the Tribes' failure to charge out the DUI as a concession that it lacked probable cause on that charge, but instead it could just be that the Tribes felt it could not prove the charge beyond a reasonable doubt because the Defendant refused to submit to the tests necessary to gather the evidence to establish evidence beyond a reasonable doubt. This is the purpose of criminalizing failure to submit to ensure that the Tribes can gather sufficient evidence when probable cause exists

¶ 10 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Tribal Court Order dismissing the criminal charges with prejudice is reversed and this matter is remanded to the Tribal Court for a determination consistent with this opinion.

SO ORDERED the 17th day of April 2023.

FORT PECK COURT OF APPEALS



Erin Shanley, Chief Justice



Associate Justice