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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

Hunter Jade Lambert, Appellant, v. Fort Peck Tribes, Appellee.	CAUSE NO. AP # 865 ORDER REMANDING FOR WITHDRAWAL OF CONDITIONAL PLEAS

Appeal from the Fort Peck Tribal Court, Lonnie Headdress, Presiding Judge.
Before E. Shanley, Chief Justice, and B.J. Jones and J. Grijalva, Associate Justices

BACKGROUND

¶ 1 This matter comes before the Fort Peck Court of Appeals on a Notice of Appeal filed October 25, 2023 from the Tribal Court's Judgment of Conviction issued on November 14, 2023, accepting defendant's conditional pleas of guilty to (1) Possession of Dangerous Drugs, 7 CCOJ 413-A, and (2) Illegal to Sell, Trade or Bargain in Drug Paraphernalia, 7 CCOJ 417.

¶ 2 Defendants convicted of a crime in the Fort Peck Tribal Court have an appeal as a matter of right from a judgment of conviction. 2 CCOJ 205(a). When

Defendants plead guilty to a crime the general rule is that they may not appeal the issue of guilt, unless they have preserved the right to appeal an issue of law by making a conditional plea. The Defendant herein did that when she pled guilty to the charges below.

¶ 3 Defendant/Appellant Lambert raises two issues on appeal. First, she argues the Tribal Court erred in finding no violation of the Indian Civil Rights Act when police searched her person and found three syringes, resulting in the drug paraphernalia charge. Second, Appellant argues the Tribal Court erred in holding that the residue of methamphetamine inside a small plastic bag was sufficient to constitute possession of a dangerous drug.

¶ 4 Both issues present mixed questions of law and fact. We review questions of law *de novo* and factual determinations to see if they are supported by substantial evidence. *See Tribes v. Dale and Reum*, FPCOA Nos. 303a and 303b (2000).

Search and Seizure of Paraphernalia

¶ 5 The Indian Civil Rights Act prohibits tribal governments from conducting unreasonable searches and seizures. 25 U.S.C. § 1302(2). There were two searches in this case. One search was of the appellant's car and its contents including appellant's purse, which contained the plastic bag with methamphetamine residue. Appellant does not contest this search because she gave explicit permission for it to both officers involved. Appellant does contest the search of her person, which yielded the three paraphernalia syringes. The Tribes and Appellant agree this was a "stop and frisk" search. The Tribes' Comprehensive Code authorizes stop and frisk searches "if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the

officer or another person present." 6 CCOJ 306(b)(2). The Tribes and Appellant disagree of course on whether the search of appellant's person met the Code's requirements.

¶ 6 Officer Oliver stopped appellant's car because its rear license plate was obscured by snow and the rear window covered in plastic, and he radioed into dispatch his action and location. Officer Evans was patrolling nearby and independently proceeded to the location. When Officer Evans arrived, Officer Oliver had completed initial contact with appellant, returned to his squad car and began inputting appellant's information into his mobile computer. The Officers conferred and Officer Oliver stayed in his car writing a citation for appellant's failure to maintain insurance, while Officer Evans approached the passenger side of appellant's car. Officer Evans engaged the Appellant and the front seat passenger, Donald Romero. Officers Evans and Oliver were familiar with Romero and his association with illegal narcotics. Evans noted that Romero was "visibly nervous," his voice "shaky" and he would not make eye contact while she spoke to him. His answers were sometimes inaudible. Officer Evans' conversation with Appellant was more productive: Evans successfully obtained appellant's permission to search her car.

¶ 7 Officer Evans went back and spoke with Officer Oliver, who had identified two outstanding felony warrants on Romero. The Officers approached the appellant's car on opposite sides. The rear windows were heavily tinted and the officers independently realized there was a third person in the back seat they had not seen before. The person identified himself and the officers recognized him as someone formerly associated with illegal narcotics. Officer Oliver confirmed with Appellant that she consented to a search of her car and then directed the three occupants to exit one at a time. Appellant exited first. Officer Evans asked Appellant to go to the front of Officer Oliver's squad car and

began a frisk search. Officer Evans immediately discovered the three paraphernalia syringes in appellant's front jacket pocket.

¶ 8 Appellant argues the search did not comply with Section 306 of Title 6 because Officer Evans had no reasonable cause to suspect that Appellant was armed and presently dangerous. The Tribes respond that syringes are sharp and can be dangerous, particularly if already used by drug addicts. Absolutely. The question, however, is whether Officer Evans had "reasonable cause to suspect" that Appellant possessed the dangerous syringes and presented a threat *before* the Officer searched appellant. 6 CCOJ 306(b)(2). In its April 12, 2023 ruling on a motion to dismiss the paraphernalia charge, the Tribal Court found "nothing in the Officer's report that indicates the defendant [appellant] was a threat and was armed and dangerous as with the passengers."

¶ 9 We are mindful of the potential of danger in every traffic stop and recognize the undisputed facts that two and perhaps all three occupants were nervous and acting suspiciously. The fact that two of them were known to police as having prior involvement with illegal narcotics, and Romero's two felony warrants, surely call for enhanced caution. Yet, neither Officer's report indicates concern for dangerous responses; instead, they note an intent to ensure no illegal items or weapons were taken by Appellant from the car. That is logical and helps enhance officer safety but unfortunately does not meet the CCOJ requirement for "reasonable cause to suspect that Appellant was armed and dangerous." We hold, therefore that the stop and frisk search of appellant's person, which yielded the three paraphernalia syringes (and a marijuana cigarette), violated Appellant's rights against unreasonable search and seizure.

Drug Residue as Possession

¶ 10 Appellant's second argument is the Tribal Court erred in holding that the residue of methamphetamine inside a small plastic bag found in her purse was sufficient to constitute possession of a dangerous drug in violation of 7 CCOJ 413-A. After Appellant gave consent, Officer Oliver searched her car and found appellant's purse and in it a small plastic bag with white powder residue that appeared to be methamphetamine. Later laboratory tests confirmed that the white powder was methamphetamine, with the weight listed as "residue."

¶ 11 The trace remains of methamphetamine in a baggie surely suggest *someone* possessed a greater amount of the drug *at some point*. But a "possession offense necessarily requires more proof than mere speculation that it is likely that, at some time in the recent past, a defendant probably had drugs in his or her possession." *State v. Carmichael*, 53 P.3d 214, 228 (Hawa. 2002) (J. Acoba, dissenting). So the question here is whether the methamphetamine residue, by itself, is sufficient to constitute possession of a dangerous drug under the Tribal Code. The Parties have cited no tribal court case and we have been unable to find one. The Parties cite other courts that have come to varying conclusions.

¶ 12 At one end of the spectrum, some courts find possession of any amount of prohibited drugs constitutes unlawful possession. *See, e.g., State v. Cheramie,* 189 P.3d 374, 378 (Ariz. 2008) (possession of a dangerous drug does not require proof of a usable quantity); *State v. Carmichael*, 553 P.3d 214, 223 (Hawa. 2002) ("possession of trace amounts is not too trivial to warrant a conviction"); *Hampton v. State*, 498 So.2d 384, 386 (Miss. 1986) ("any identifiable amount, however slight, constitute[s[s a crime'). Some

courts uphold guilty verdicts without addressing or even acknowledging the question that confronts us. *See, e.g., State v. Cooney*, 149 P.3d 554 (Mont. Sup.Ct. 2006) (resin in methamphetamine pipe). Some courts find justification for guilty possession of minute amounts of dangerous drugs by comparing marijuana possession laws that distinguish between amounts of the drug with methamphetamine possession laws that do not. *See State v.* Wood, 191 P.3d 463, 468 (Mont. 2008).

¶ 13 At the other end of the spectrum, some courts require a usable or saleable amount of drugs to constitute possession. *See People v. Rubacalba*, 859 P.2d 708 (Cal. S.C.1993) (small crack cocaine "rock" insufficient for conviction). Other courts express concern over the potential subjectiveness of the usable quantity standard and ask instead whether the drug amount is measurable; trace amounts of a prohibited substance, though detectable, do not constitute possession. *See, e.g., United States v. Jeffers,* 524 F.2d 253, 258 (7th Cir. 1975); *see also Price v. United States*, 746 A.2d 896, 898 (D.D.C. 2020) (powder in baggies with unquantified amounts of heroin insufficient for conviction); *Thomas v. United States*, 650 A.2d 183, 188 (D.D.C. 1994) (*en banc*). *State v. Moreno*, 374 P.2d 872 (Ariz. 1962) (*en banc*) (there can be no conviction "where there is only a trace of a substance ... and there is no additional proof of its usability").

¶ 14 Some courts observe that as technology improves, crime laboratories will be increasingly able to detect infinitesimal or microscopic drug amounts raising questions about whether it is reasonable to assume the defendant knew he possessed the drug. *See People v. Leal*, 64 Cal.2d 504, 506 (Cali. 1966) ("the inference of knowledge [of unlawful possession] cannot stand if the evidence discloses only minute quantities of narcotic residues"); *People v. Aguilar*, 223 Cal.App.2d 119, 123 (1963) ("It is not scientific

measurement and detection which is the ultimate test of the known possession of a narcotic, but rather the awareness of the defendant of the presence of the narcotic"). And some courts have noted that legislative bodies could easily include minute amounts in possession offenses. *See Carmichael*, 53 P.3d at 220 (applying state law prohibiting possession of "any dangerous drug *in any amount*" (emphasis added)).

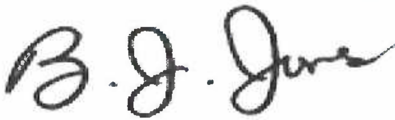
¶ 15 Appellant was charged with unlawful possession of dangerous drugs under 7 CCOJ 413-A(a). A person is guilty of that offense if she "possesses *any* of the dangerous drugs defined in Section 413(a)." Section 413(a) prohibits the unlawful sale of a list of drugs, including "*any* opiate or *any* substance, compound or derivative thereof ... including ... methamphetamine." 7 CCOJ 413(a) (emphasis added). The emphasized term "any" in both Code Sections above clearly refers to the *list* of drugs following the term. Neither Section 413(a) or Section 413-B criminalizes "any amount" of any dangerous drug. The baggie here was certainly indicative that at one time there was an amount of methamphetamine in it, but that alone cannot suffice for a possession conviction. In the absence of evidence that the residue itself was usable to become under its influence or saleable, we hold that it cannot constitute possession of a dangerous drug under the existing Code. The Tribal Council adopted its drug laws in the exercise of its inherent sovereignty to protect the public health and welfare, and minute amounts of drugs that are not usable or saleable do not endanger the health or welfare of the community. Ingestion laws are designed to address those situations where a person has already ingested the illegal substance and possession laws are designed to address those persons in possession of amounts of drugs that can be used to become under its influence or to distribute.

¶ 16 The case is remanded to the Tribal Court to permit the Appellant to withdraw her pleas to the two charges and to apply the legal standards set out herein should the Tribes opt to prosecute the Appellant for the two charges.

SO ORDERED this 10th day of April, 2024.

FORT PECK COURT OF APPEALS

Erin Shanley, Chief Justice



B.J. Jones, Associate Justice

James Grijalva, Associate Justice