

FILED

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Fort Peck Tribal Court
of Appeals

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

SCOTT KOHL, APPELLANT, vs. FORT PECK TRIBES, APPELLEE	CAUSE NO. AP # 758 ORDER AFFIRMING LOWER COURT
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Appeal from the Fort Peck Tribal Court, Marvin Youpee, Presiding Judge.

Appellant appeared by and through Tribal Public Defenders, Terry Boyd and Dustin Kuipers

Appellee appeared by and through Tribal Prosecutor, David Murgudich.

Before Smith, Chief Justice, Desmond and Shanley, Associate Justices

BACKGROUND

¶ 1 On November 6, 2017, BIA Lt. Martell went to Tribal Express gas station to investigate a report that a silver Impala had made a u-turn in the middle of the highway and almost caused an accident. Upon arriving at the gas station, Lt. Martell located the Impala which contained both a front and backseat passenger. The backseat passenger would not identify himself, so Lt. Martell requested that the

criminal investigator come and identify the passenger. Lt. Martell suspected that the individual might be a recent escapee from the detention center.

¶ 2 Criminal Investigators Matthews and Trottier arrived and identified the passenger as Keaton Wolf. The front seat passenger was identified as Bobby Weeks. At this time, the driver, Scott Kohl, exited the gas station and was speaking with Lt. Martell outside of the vehicle. Lt. Martell then requested Wolf to exit the vehicle and speak with him as well.

¶ 3 As CI Matthews spoke to Bobby Weeks, he observed a gun stuffed between the front seat and the center console and requested that Weeks hand him the gun. There had been a prior report to law enforcement that Scott Kohl had threatened someone with a gun. CI Matthews conducted an NCIC check on the gun and it came back that the gun was stolen. Scott Kohl then admitted it was his gun and that he purchased it from a friend but could not recall which friend. CI Matthews asked Kohl if he had any other weapons in the vehicle and he did not respond. CI Matthews advised Lt. Martell to place Kohl under arrest for felony theft and conducted a search incident to arrest of the entire vehicle.

¶ 4 CI Matthews observed an AR magazine loaded with bullets between the driver seat and the console. Inside the center console additional AR Magazines and a Ruger .357 revolver were located. CI Matthews asked Kohl where the AR was located and Kohl responded that it was in the trunk. Upon opening the trunk, CI Matthews found two AR's and a .22 rifle. Upon conducting an NCIC search of the weapons, CI Matthews found out one of the AR's had been reported stolen. CI Matthews also seized and secured a black safe located between the passenger seat and the console.

¶ 5 On November 7, 2017, CI Matthews obtained a search warrant to open the gun safe which was seized from the vehicle. The safe contained 6 gabapentin pills, a Smith and Wesson 380 caliber pistol and holster with a loaded magazine, a plastic bag containing 18 syringes, a small digital scale, a lighter torch, and a plastic baggie containing shards of methamphetamine.

¶ 6 Kohl appeared in Tribal Court on November 10, 2017 and pled not guilty to the charges of Theft, Unlawful Possession of Dangerous Drugs, Unlawful Possession of Dangerous Drugs with Intent to sell, Illegal to Sell, Trade or Bargain in Drug Paraphernalia, Possession of a Firearm in Drug Related Crimes, and Unlawful Sale, Use, Abuse, Possession of Prescription Medication.

¶ 7 On December 8, 2017, Kohl filed a Motion to Suppress the evidence in this matter based on an illegal search in violation of his rights under the Tribal Code and Indian Civil Rights Act. The Tribe responded on December 22, 2017. The parties waived their right to a hearing and the Tribal Court denied the Motion on January 5, 2018. Kohl appeals the denial of his Motion.

STATEMENT OF JURISDICTION

¶ 8 The Fort Peck Appellate Court may review final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The Fort Peck Appellate Court also has the ability to entertain interlocutory appeals when the issue implicates important constitutional rights and the outcome of the trial will be altered in such a manner to cause irreparable harm to the aggrieved party. Rules of Appellate Procedure, Rule 6. The Court's denial of Defendant's Motion to Suppress constitutes a matter appropriate for an interlocutory appeal.

STANDARD OF REVIEW

¶ 9 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”. *Id.* Whether the Tribal Court correctly determined the legality of the search conducted of Appellant’s vehicle is a question of law and will be reviewed de novo.

ISSUES

¶ 10 The following issues have been raised on appeal:

- 1) Is a seizure lawful when an officer sees a gun in plain view located in a vehicle and obtains the gun to run a status check through the National Crime Information Center (NCIC)?
- 2) Is a search incident to arrest of an entire vehicle lawful when the driver and passengers of the vehicle are secured outside of the vehicle at the time of the search?

DISCUSSION

¶ 11 As stated by this Court in *Mitchell v. FPT*, FPCOA No. 743 (2017) the Tribe may not violate a person’s right to be free from unreasonable search or seizures. 6 CCOJ §303 and Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302(a)(2) The general rule is that a law enforcement officer must obtain a search warrant prior to conducting a search, subject to six particular exceptions. These exceptions include search incident to arrest, the automobile exception, plain view, consent, stop and frisk, and hot pursuit or exigent circumstances.

¶ 12 As in prior cases involving ICRA rights which replicate those afforded to individuals under the U.S. Constitution, this Court finds it appropriate to analyze U.S. Supreme Court case law interpreting those protections.

¶ 13 In *Chimel v. California*, 395 U.S. 752 (1969), the Supreme Court concluded a search incident to arrest may extend to the space within the arrestee's "immediate control," from which he could obtain a weapon or destroy evidence. That case involved the search of Chimel's home.

¶ 14 In general, one's expectation of privacy in their automobile is less substantial than in his/her home. *New York v. Class*, 475 U.S. 106 (1986). The Supreme Court has allowed searches of vehicles incident to arrest of drivers and/or passengers according to a policy of officer safety and evidence preservation. The Court further determined the mobility of a vehicle justifies a search incident to arrest when it is reasonable to believe that evidence of the offense may be found in the vehicle. *Arizona v. Gant*, 556 U.S. 332 (2009).

¶ 15 Similar to the case at hand, in *New York v. Belton*, 453 U.S. 454 (1981), the driver and all occupants of the vehicle were under arrest, but located outside of the vehicle and were unsecured with only one officer present. The Court concluded the search of a jacket found inside the vehicle was reasonable in light of these circumstances because the officer believed the arrestees could have accessed the vehicle and its contents. In this case, the three occupants were removed from the vehicle during the search of the vehicle which was conducted incident to Kohl's arrest for possessing a stolen firearm.

¶ 16 In *Arizona v. Gant*, 556 U.S. 332 (2009), the driver of the vehicle, who was the sole occupant, was arrested for driving under suspension, handcuffed, and

placed in the police vehicle. Then, the officers searched the vehicle. The Court found that when there is no realistic possibility that an arrestee could access his vehicle and there would be no further evidence of the arrest contained therein, the search is not permissible under the search incident to arrest exception. In that case, because the Officers already had all the evidence necessary for the charge of driving under suspicion, the Court found no other justification for the search. Contrarily, in this case, the driver was charged with possessing a stolen firearm and admitted there was ammunition and other firearms in the vehicle.

¶ 17 The Supreme Court also extends an officer's lawful ability to search a vehicle without a warrant if he has reasonable suspicion that any person in the vehicle is dangerous and might access the car to get a weapon. *Michigan v. Long*, 463 U.S. 1032 (1983). If the officer has probable cause to believe the vehicle contains evidence of criminal activity, the officer can lawfully search without a warrant. *U.S. v. Ross*, 456 U.S. 798 (1982). The plain view exception allows officers to make a warrantless seizure when they discover evidence or contraband in plain view and have probable cause to believe it is an instrumentality of a crime.

¶ 18 This case can be distinguished from *Fort Peck Tribes v Grant*, FPCOA No. 106 (1990) where the court concluded that a warrantless search is not appropriate unless exigent circumstances exist. That case involved the search of a home upon information provided by an informant. The officers in that matter had ample opportunity to seek a search warrant from the Court. In this matter, the mobility of the vehicle coupled with the presence of guns, justify a search for the purposes of preserving the evidence and officer safety.

¶ 19 Here, the officers previously received a report of Kohl threatening an individual with a gun. Upon investigation of a separate and unrelated traffic violation, they witnessed a gun in plain view in Kohl's vehicle. Based on the information they received, they had the ability under the plain view exception to seize and determine the status of the gun through NCIC. Once the officers determined the gun was stolen, they had probable cause to arrest Kohl. The search of his vehicle incident to that arrest is in accordance with the policies of officer safety and evidence preservation outlined by the Supreme Court. The automobile exception also justifies the extended search because the officers had probable cause to believe the vehicle contained contraband based on Kohl's own statements.

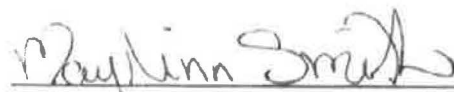
ORDER

¶ 20 Based on the foregoing analysis, this Court AFFIRMS the lower court's Order denying Defendant's Motion to Suppress.


SO ORDER the 14th day of June 2018.

FORT PECK COURT OF APPEALS


BY



Maylinn Smith, Chief Justice



Erin Shanley, Associate Justice



Brenda C. Desmond, Associate Justice