

FILED

DEC 30 2019

**Fort Peck Tribal Court
of Appeals**

Appellate Court
Fort Peck Indian Reservation
P.O. Box 1027
Poplar, Montana, 59255
PHONE 1-406-768-2400
FAX 1-406-768-3710

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

CHANCE MARTELL, vs. Fort Peck Tribes,	Appellant Appellee.	CAUSE NO. AP # 782 OPINION AND ORDER
-----------------------------------------------------	--------------------------------	----------------------------------------------------

Appeal from the Fort Peck Tribal Court, Marvin Youpee, Presiding Judge.

Appellant Chance Martell, represented by Dustin Kuipers.

Appellee Fort Peck Tribes, represented by Tribal Prosecutor Scott Seifert.

Before E. Shanley, Chief Justice; B. Desmond, Associate Justice; and M. Smith, Justice by Special Appointment.

BACKGROUND

¶ 1 This matter comes before this Court on Notice of Appeal filed on April 11, 2019. Appellant also filed a request for a stay on April 16, 2019 and again on May 1, 2019, along with a motion requesting that the lower court be ordered to provide the transcript of the jury trial proceedings. The appeal was granted and a stay issued on May 6, 2019. This Court issued a briefing schedule and granted Appellant's motion requesting the transcript. Appellant's motion to extend the briefing time based on the availability of the transcript was filed on May 13, 2019. This motion was also granted by the FPCOA.

¶ 2 Appellant was served with the transcript on June 18, 2019. Appellant's opening brief was filed July 15, 2019. The Tribes' response was filed on July 26, 2019. The Appellant's reply was filed August 5, 2019. Given the due process issues raised by this appeal and the seriousness of the underlying charged offense, oral arguments were ordered.

¶ 3 Present for oral arguments on September 27, 2019 were Appellant, Chance Martell; his attorney Dustin Kuipers; and Tribal Prosecutors Scott Seifert and David Mrgudich.

STATEMENT OF JURISDICTION

¶ 4 The Fort Peck Appellate Court reviews final orders from the Fort Peck Tribal Court. 2 CCOJ §202. The sentencing order based on the jury finding Appellant guilty of murder is a final order.

STANDARD OF REVIEW

¶ 5 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. Great deference is given to determinations made by a jury as the finder of facts. Procedural due process issues are reviewed de novo when properly preserved in the lower court proceedings. Given the discretionary component connected to any sentences not violating statutorily imposed limits, a court's sentencing determinations are only set aside when it can be shown the court abused its discretion.

ISSUES

¶ 6 The following issues have been raised on appeal:

1. Did the lower court err by allowing amendment of the charging document to address the possibility of enhanced sentencing less than 30 days before the pretrial conference?
2. Did the lower court err by granting Tribes' request for continuance four days before the trial was scheduled?
3. Did the lower court err when it failed to issue summonses for Appellant's witnesses based on the filed witness list when it issued summonses for the Tribes' witnesses based on its filed witness list?
4. Did the lower court err by not identifying the alternate juror prior to the commencement of trial and not declaring a mistrial when a juror appeared to be sleeping?
5. Did the lower court abuse its discretion by sentencing Appellant to three (3) years incarceration?

¶ 7 The record before this Court reflects that several of the issues now being raised on appeal were neither raised nor properly preserved for review during the lower court proceedings. This deficit in the record makes it difficult for this Court to adequately address Appellant's concerns. Challenges made for the first time at the appellate level are particularly problematic since the lower court had no opportunity to directly respond to and issue a ruling on concerns that may involve both issues of fact and law, thereby creating a robust record for review. Unlike in *Clark v FPT*, FPCOA No. 32 (1987), Appellant had the benefit of legal counsel at his trial. This Court, therefore, can only infer that counsel for Appellant has some legitimate litigation strategy for not challenging any perceived due process problems and for not requesting a continuance of the trial to ensure Appellant was

able to exercise all recognized rights under applicable law. To the extent an issue has not been waived by Appellant's actions at trial, this Court will address the concerns raised.

¶ 8 Although the Tribes are encouraged to always include information about the possibility of enhanced sentencing on any initial complaint where a sentence of more than one year is allowed under applicable law, nothing in the record shows that the process utilized for amending the complaint in this situation violates applicable law. 6 CCOJ §511. Certainly any time frames associated with continuing a trial based on the Tribes' notice of intent to seek enhanced punishment at any point after the filing of initial charges must be attributable to the Tribes for purposes of calculating speedy trial requirements. Given the very serious nature of the underlying offense in this case, the Tribes requesting enhanced sentencing was not unreasonable. Allowing the Tribes to amend their complaint in this matter for Appellant to receive notice of the Tribes' intention to seek enhanced punishment is allowed under applicable law. *Id.*

¶ 9 Nothing in the record reflects that Appellant's fundamental rights to a speedy and public trial were impaired by this request. Appellant had already entered a not guilty plea to the homicide charge and already had legal representation. Further, Appellant was given sufficient time from the time the amendment was granted to prepare for trial based on the possibility of enhanced sentencing being imposed if he were found guilty. Although it is unclear why the Fort Peck Tribes' Comprehensive Code of Justice attaches the notice of intent to seek enhanced punishment to the pre-trial conference, instead of associating it with a specific period of time after the filing of the complaint or before the trial, the wording of this statute provides a remedy for any untimely notice by requiring a

continuance upon the motion of the Appellant. 6 CCOJ §511 (a). This type of procedural remedy is consistent with recognized due process requirements.

¶ 10 Appellant did not request any continuance in accordance with the Tribes' notice of its intent to seek enhanced punishment. Nothing in the record indicates that Appellant would have been denied a continuance if he had requested additional time to prepare for trial based on the Tribes' intent to seek enhanced punishment for the homicide charge. The record does not reflect that the lower court failed to comply with the statutory remedy for untimely notices in this situation. Appellant chose to proceed to trial and made no request for a continuance as was his right under applicable law. Therefore, this Court cannot find that Appellant suffered any due process violations due to the timing of the Tribes' notice of intent to seek enhanced punishment.

¶ 11 As for the lower Court's granting the Tribes' Motion to Continue four days prior to the trial, we find no error. The issue of continuance is not directly addressed in the Criminal Procedure section of the Fort Peck Tribes' Comprehensive Code of Justice. Decisions of this Court addressing continuances have adopted a rule that granting or denying of a motion to continue is within a court's discretion and should not be disturbed absent abuse of discretion. *FPT V Stafne*, FPCOA No. 351 (2002). The *Stafne* Court articulated seven basic factors that must be considered when deciding whether to grant or denying a motion to continue in a criminal matter. Although not an exclusive list, at a minimum, a court should consider whether:

1. a fundamental right will be violated;
2. the non-moving party will be prejudiced by the decision;
3. the request is calculated to delay the proceedings;

4. granting the request would cause unreasonable delays in the proceedings;
5. granting or denying the motion would prevent a fair trial on the merits;
6. the moving party impermissibly contributed to the need for the motion; and
7. the moving party has tried to avoid any delay which would be caused by the motion.

¶ 12 The record does not reflect that the lower court abused its discretion by granting the Tribes' request for a continuance, even though it was within days of a scheduled trial date. Overlapping governmental jurisdiction in situations involving major crimes in Indian country contributes to complex custody of evidence issues. Penalizing Tribes for the unavailability of requested evidence in the custody of the Federal Bureau of Investigation [FBI], yet needed for trial in the tribal system, would significantly impair tribal sovereignty concepts associated with public safety and prosecution of alleged offenses occurring within Indian country. The Tribes also have a right to fundamental fairness in criminal system which includes permitting access to evidence within time frames which do not violate speedy trial requirements.

¶ 13 Unfortunately, Tribes have no control over the operations of the FBI and cannot simply compel the return of evidence needed by a Tribe to prosecute criminal offenses. Although this type of delay in the proceedings is attributable to the prosecution for purposes of determining speedy trial issues, the lower court decision to grant the tribal prosecutor's request for a continuance was within its discretion and consistent with prior decisions of this Court. *FPT v Buckles*, FPCOA No. 330 (1999). Nothing in the record reflects that it was done to harass or delay the proceedings or that it denied the Appellant a speedy and public trial.

¶ 14 Issues surrounding the attendance of witnesses at trial were first addressed by this Court in *FPT V Clark*, FPCOA No. 036 (1987). Unfortunately, the Comprehensive Code of Justice does not establish a clear process for what steps must occur to trigger the issuance of subpoenas by the court for purposes of compelling the attendance and testimony of witnesses in court proceedings. 6 CCOJ §502. This Court previously found that the lower court alone is responsible for issuing subpoenas and it must also ensure witnesses are served and the process applied uniformly to both the defense and prosecution. *Id. FPT v Stafne*. The record in this matter reflects that the process for subpoenaing witness is not being handled uniformly by the lower court. The Prosecution's witnesses were subpoenaed based on the Tribes' submission of a witness list. Appellant's witnesses were not similarly subpoenaed based on the Appellant's submitted witness list.

¶ 15 The lack of uniformity in the above process is problematic based on concepts of fundamental due process. This method of operation certainly has the potential of impacting the fundamental rights noted by the *Clark* Court. Unfortunately, the record does not reflect that Appellant took the steps identified by this Court in *FPT v Buckles* to either remedy or adequately preserve the issue. Most importantly, Appellant did not request a continuance to ensure the attendance of any witnesses he deemed essential to adequately defend against the alleged offense, including any affirmative defenses. By not challenging the effects of this process Appellant's ability to defend himself, by requesting a continuance, Appellant waived any right to raise a due process claim on appeal.

¶ 16 Given that compelling the attendance of witnesses is a guaranteed right of any defendant in a criminal matter, 6 CCOJ §501, any delay cause by a continuance also would have been attributable to the Tribes. By using a process deemed impermissible by the *Clark*

Court for compelling attendance of identified witness, the lower court would have been required to find any delay caused by its action counts against the Tribes when calculating speedy trial times. Appellant could have adequately preserved this issue by requesting a continuance, which also would have allowed the lower court an opportunity to assess the situation and grant the relief it deemed appropriate to promote fundamental fairness and to create a record sufficient for determining abuse of discretion issues upon appellate review.

¶ 17 It is unclear to this Court why Appellant's counsel chose to forego the commonly accepted remedy of requesting a continuance and instead elected to proceed to trial. However, by utilizing this litigation strategy, Appellant failed to adequately preserve the issue for appellate review and did not demonstrate why a continuance should not have been used to compel the attendance of any witnesses Appellant felt were necessary to adequately defend against the charge of homicide.

¶ 18 Any person accused of a crime punishable by imprisonment can request a jury trial at the time of arraignment. 6 CCOJ §507. This right requires that at least six qualified people be selected to serve on the jury. No statutory provision requires or addresses the selection and duties of any alternate juror. It is within the Court's discretion to select an alternate juror and it is also appropriate that an alternate juror be identified prior to the prosecution commencing its case in chief. Without any legislative direction on this optional jury process, the Court must simply ensure that at least six qualified jurors rendered any final decision regarding questions of fact based on the applicable law. The record in this matter reflects that the decision regarding whether Appellant had committed the offense of homicide was made by six qualified jurors.

¶ 19 The information before this Court reflects that the juror of concern was excused at the conclusion of the trial and did not participate in jury deliberations. Given the lack of any identified harm to Appellant based on the actions of a juror found to be an alternate by the lower court, this Court does not find reversible error due to the make up or actions of the jury. Any concerns about how alternate jurors may be utilized in the tribal system are best addressed through legislative action which details the scope and requirements of this option within the jury system process. If alternate jurors are going to be used by the tribal court system, statutory provisions should be enacted to identify a clear process for insuring procedural issues are enumerated regarding the use of alternate jurors; the responsibilities of alternate jurors and their corresponding powers.

¶ 20 Appellant also challenges the sentence imposed by the lower court in response to the jury finding him guilty of murder. Sentencing is highly discretionary. When imposing a sentence, the judge should, at a minimum, take into consideration the severity of the charge, the criminal history of the defendant, any possible mitigating factors and should articulate the specific reasons for imposing a particular sentence.

¶ 21 Only by showing a clear abuse of discretion will a lower court's sentencing decision be overturned. Appellant failed to show adequate grounds to support a finding of abuse of discretion in this sentence. The offense for which Appellant was found guilty reflects conduct which would be punishable by more than 1 year if prosecuted by the United States or a state, 6 CCOJ §512. The sentencing does not conflict with any provision of 6 CCOJ §601. Nothing in the record reflects that the lower court imposed a sentence of three (3) years in an arbitrary or capricious manner. Nothing in the record reflects that a sentence of three (3) years is excessive for the offense of homicide.

ORDER

¶ 22 Based on the above analysis, this Court findings no due process violations were adequately preserved for appeal and the lower court's actions did not reflect any abuse of discretion. The issues now being raised by Appellant are matters which should have been raised and remedied in the lower court by simply requesting a continuance. Since every instance where Appellant could have requested a continuance to address a potential due process issue would have been attributed to the prosecution for speedy trial calculations, this Court finds no legal grounds for reversing the lower court for a violation of due process. By making the strategic decision to proceed to trial and not exercise his right to a continuance, Appellant waived his right to challenge any procedural errors. Appellant failed to demonstrate that he was unable to receive a fair, impartial, public and speedy trial because of lower court's handling of these proceedings. This Court, therefore, AFFIRMS the jury's finding of guilt and the lower court's sentencing decision.

SO ORDER this 24th day of December 2019.

FORT PECK COURT OF APPEALS

BY



Brenda C Desmond, Associate Justice

Maylinn Smith, Justice by Special Appointment