IN THE COURT OF APPEALS
OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION

	)	Cause No. AP-09-1864-CR
CONFEDERATED SALISH,	)	
AND KOOTENAI TRIBES,	)	
Plaintiff/Appellee	)	
vs.	)	
	)	OPINION
MOSE MOULTON,	)	
Defendant/Appellant	)	
	)	
	)	

Appeal from the Tribal Court of the Confederated Salish and Kootenai Tribes, Honorable David Morigeau, presiding.

Appearances:

Laurence Ginnings, Confederated Salish and Kootenai Tribes, Attorney for the Appellee.

James Gabriels, Confederated Salish and Kootenai Tribal Defenders Office, Attorney for the Appellant.

Before Chief Justice Eldena Bear Don't Walk, Associate Justice Daniel Belcourt and Associate Justice Robert McDonald.

INTRODUCTION

This Court, sua sponte, sets aside CSKT 1-2-803 which dictates the time the decision shall be rendered. The complexity of this matter required that the Court set aside the time limit in order to complete its decision.

Defendant Mose Moulton filed a motion to suppress evidence that he argues stems from an illegal search of his vehicle. That motion, after an evidentiary hearing by the lower court, was denied. Reserving his right to appeal that determination, Mr. Moulton pled guilty to the charge of Criminal Possession of Dangerous Drugs, a misdemeanor. We REVERSE and REMAND back to the lower court.

Moulton states the issue on appeal as whether the police officers violated his right to be free from unlawful search and seizure. We address only the narrow and dispositive question of whether the officers had particularized suspicion to stop Moulton's car.

BACKGROUND

On October 5, 2009, at 3:35 A.M., the Lake County Sheriff's office received a call about potential spot lighters on Emory Road. The reporting party, Mr. Hoversland, told the dispatcher handling his call that he heard what he thought was a gun shot. He said he believed one deer has been shot already. Mr. Hoversland did not provide any other detailed information at the time of the call. He did not know for sure if an animal had been poached, whether or not the sound he heard was a gunshot, or a description of the person or persons involved in the act of poaching. Mr. Hoversland lives on Emory Road which is in the country and considered part of Pablo.

Hearing the radio traffic about Mr. Hoversland's call, Tribal Officer Casey Couture, along with Lake County Deputy Sherriff Ryan Funke, responded from north of Pablo, Montana, heading south toward Emery Road. Emory Road is a country road east of Ronan and Pablo. Two additional tribal officers, Officers Ascencio and Adams, drove toward Emory Road from Pablo. At that time, Officer Couture, also, requested that Ronan City Officer Seymour assist. The report filed by Officer Couture states that each

officer or set of officers drove toward Emory Road on different roads from different directions.

Officer Couture states, both in testimony and his report, that at 3:43AM, the officers were converging on Emory Road. It is unclear from the record, the actual location or distance from Emory Road, of each car at the time Officer Couture says they were all "converging." According to the lower court record, Ronan City Officer Seymour saw a red pickup on Foothills and turning onto Spring Creek Road. It is unclear whether the car was turning east or west onto the road. Officer Couture radioed Officer Seymour to stop the vehicle. Officer Couture testified that from the time of the first radio dispatch about Mr. Hoversland's call, until the stop of the vehicle, about ten minutes had elapsed. At 3:47AM, according to the case report, Officer Couture saw a different vehicle turning out of Emory Road closer Hoversland's house. That vehicle was not pursued.

At 3:49 AM, Ronan Officer Seymour requested assistance at his location on Spring Creek Road because he might have the suspect vehicle. Ronan Officer Seymour stated that he saw what he believed to be fresh blood on the tailgate. There are no photographs or other evidence showing the substance to be blood, or testimony as to how Officer Seymour identified the substance as blood. It was Officer Couture's testimony that the blood on the tailgate was not seen until after Officer Seymour stopped the red pickup.

Office Couture responded to Officer Seymour's request for backup. Officer Seymour advised Office Couture that the driver of the truck, Mose Moulton, had what the officer observed to be fresh blood all over his hands and clothes. Officer Couture testified that he saw what he believed to be blood on Moulton's hands, fingers, fingernails, and

clothes upon Couture's approach of the truck. At some point, during this observation, one of the officers asked Moulton if he had been in the area of Emory Road. Moulton denied being in that area.

According to the case report, Deputy Funke observed a bag of marijuana in plain view on the driver side floor boards after Moulton exited the truck. At that time, Officer Couture asked the passenger, Garrett Finley, to exit the vehicle. Officer Couture observed that Finley, also, had blood on him. When asked, Finley denied knowing anything about an illegally taken deer.

Moulton was placed under arrest by Officer Seymour and transported to Tribal Law and Order. It is unclear from the record or the case report, what Moulton had been placed under arrest for.

Finley was detained and then transported by Officer Couture to Tribal Law and Order. Officer Couture took statements from both men and photographed the blood on their hands and clothing.

Both men were advised of their Miranda Warnings and both agreed to speak to Officer Couture without an attorney. Both men explained that earlier in the day, Finley, a tribal member, had shot a deer. The pair dressed out the deer later that evening. When asked about the blood on his hands, Finley explained he had not washed his hands and that it gave him some bragging rights about getting his deer. Moulton corroborated that they had gotten a deer earlier that day and skinned it later that evening. When asked how he had gotten to Spring Creek Road, Moulton stated that he had taken Old Highway 93 all the way across to North Crow Road, south on Foothills to the point of the traffic stop.

Finley gave a conflicting statement saying they drove on Clairmont Road to Foothills to the point of the traffic stop.

The case report is void of any information or questioning with regard to the marijuana the officers saw in the car. Moulton was charged by Criminal Complaint on October 7, 2009 of one count of Criminal Possession of Dangerous Drugs, as specified in Section 45-9-102, M.C.A., as incorporated by Section 2-1-1401 of the Confederated Salish and Kootenai Laws Codified.

Moulton pled not guilty. On October 28, 2009, Moulton, through his attorney, filed a Motion to Suppress and Brief in Support. He requested that all evidence, as a result of the traffic stop, be suppressed, arguing that the officers did not have particularized suspicion to stop the truck. The Confederated Salish and Kootenai Tribes, through its prosecutor, filed an Answer Brief Opposing Motion to Suppress. Moulton filed a reply and the issue was set for an evidentiary hearing in front of the presiding judge.

On February 15, 2010, the parties convened for an evidentiary hearing. The only witness called was Officer Couture. According to the transcript, Officer Couture stated that he "went down east on Clairmont Road and attempted to locate <u>any</u> vehicles coming out of that area."(Emphasis added). When asked why he had reason to order Seymour to stop the truck, Officer Couture answered, "I believe that because there had been shots fired and it was a particularized suspicion that this is the only vehicle in the area at the time that a crime was possibly committed." The prosecutor asked the officer "...is it fair to say that you would have stopped <u>any</u> vehicle that you saw in the area out there at that time?"(Emphasis added). The officer replied, "Yes."

Officer Couture acknowledged, under questioning by Moulton's attorney, that the officers had no description of the animal allegedly taken, no description of the vehicle being used, if there was a vehicle, and no description of the person or persons involved in the alleged "gunshot." He, also made contradictory statements, first saying that everything that happened that night was in his report. The officer then later made a statement saying, "Just because it isn't in my report doesn't mean it didn't happen." There are issues in his report that he was not questioned about such as the other car that the dispatch notes say that officer saw after the red pickup had already been stopped.

The case report said that the reporting party called about spotlighters out on Emory Road. Mr. Halverson did not identify a vehicle, give any further description or have any knowledge about which way the alleged poachers went. Nothing in the record indicates that Mr. Halverson actually saw anything. The report, simply, says that the reporting party called in about "shots being fired."

The evidentiary hearing concluded and the lower court issued an order on February 17, 2010. The Order denied Moulton's Motion to Suppress stating that "considering the totality of the circumstances, the officers had particularized suspicion to do an investigative stop of the Defendants(sic) vehicle."

The court offered no Findings of Facts or Conclusions of Law. Moulton entered into a plea agreement, pleading guilty to the charge of Criminal Possession of Dangerous Drugs on November 8, 2010. A stipulation of that agreement was that he reserved the right to appeal the denied motion to suppress.

STANDARD OF REVIEW

This Court reviews mixed questions of facts and law de novo. *Northwest Collections, Inc. v. Pichette*, AP-93-077-CV (1995).

DISCUSSION

Did the Trial Court err in finding that particularize suspicion existed when stopping Moulton's truck?

This is a case of first impression for this Court on several fronts. First, the Court has not set a standard of review for issues with regard to search, seizures and particularized suspicion. In several of the Court's criminal appeals opinions, no standard of review has been enunciated. The closest determination the Court has made was with regard to the suppression of evidence in CSKT vs Sorrell. That case involved the trial court's allowance of prejudicial prior acts into evidence, at the objection of the defendant, and on appeal, determined that as an abuse of discretion, such evidence was reversible error.

This case differs, in that, the issue on appeal is whether or not the stop that lead to evidence the Appellant wanted suppressed, was, in fact, a "good stop." Such a determination is made by the lower court applying the law to the facts, making this case a mixed question of law and fact. Both sides, in this matter, argue that the standard of review for this case should be de novo because the issue is whether or not the trial court, given the facts, correctly applied the law. This Court applies the de novo standard.

Secondly, the Court has not directly interpreted the Code with regard to investigatory stops and the application of particularized suspicion. Nor does the Code or case law specifically cite a choice of law for criminal matters.

The Appellant raises the issue that the officers' claim of particularized suspicion does not rise to the level necessary to make the stop legal. We agree.

The Confederates Salish and Kootenai Laws Codified(hereinafter "the Code") governs the criminal procedures of those who fall within the tribal court's jurisdiction. The Confederated Salish and Kootenai Constitution has incorporated the Indian Civil Rights Act, 25 USC §1302(2). Included in that is the right to be free from illegal search and seizure. Specifically, No Indian tribe in exercising powers of self government shall:

> Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to searched and the person or thing to be seized.

The right to be free from illegal search and seizure applies under the Fourth Amendment of the United States Constitution. This right applies to seizures of the person, including brief investigatory stops such as the stop of a vehicle. Reid v. Texas, 443 U.S. 438, 440 (1980). An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in a crime. Brown v. Texas, 443 U.S. 47, 51 (1979).

In the instant case with the issue on appeal, the Code says:

> 2–2–214. Investigative stop. In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a law enforcement officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense.

The Code only mentions particularized suspicion in this one section. It does not define what constitutes particularized suspicion nor does it give a standard that needs to be met by an officer to reach that level.

Because the Code is silent in its definition, this Court then must look at its case law. As noted, this is a case of first impression for this Court and none of the twenty or more years of case law has any issue even remotely similar. The Code is, also, silent as to the laws applicable in a criminal proceeding and a procession in the choice of law. The Code spells out the laws applicable and procession of the choice of law for civil cases in 4-1-104, saying:

> **4-1-104. Laws applicable in civil actions.** (1) In all civil actions, the Tribal Court shall first apply the applicable laws, Ordinances, customs and usages of the Confederated Salish and Kootenai Tribes and then shall apply applicable laws of the United States and authorized regulations of the Department of the Interior. Where doubt arises as to customs and usages of the Tribes, the Tribal Court may request the advice of the appropriate committee which is recognized in the community as being familiar with such customs and usages. Any matter not covered by Ordinances, customs and usages of the Tribes or by applicable federal laws and regulations may be decided by the Court according to the laws of the State of Montana.

In a review of the criminal section of the Code, there are references to the use of the Federal Rules of Evidence in 2-2-1004, Rules of Evidence, 2-2-813 Use of Depositions in Trial and 2-2-804(6) Disclosure by Prosecution. Nowhere in the Code is Montana law determined to be authority. The Code does include statutes that were incorporated as directly drafted by the Montana Code Annotated. Because the Federal Rules of Evidence apply, we will apply the federal case law to this issue.

In the interest of tribal sovereignty and the unique situation of tribal courts and codes, this Court, also, places a high level of persuasion on cases from other tribal courts who have dealt with this issue. While all tribes are different, have different codes and different cultures, many of them are similarly situated having incorporated the Indian Civil Rights Act (ICRA) into their constitutions. Such case law is better suited in its

analysis of ICRA issues than those cases using the state laws based on the state constitution.

United States v. Cortez, 449 U.S. 411 (1981) is seen as the pinnacle United States Supreme Court case dealing specifically with brief investigatory stops. Such stops are protected by the Fourth Amendment of the United States Constitution which specifically guards against:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by ` oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

In Cortez, the Court said:

> Courts have used a variety of terms to capture the elusive concept of what cause is sufficient to authorize police to stop a person. Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise. But the essence of all that has been written is that the totality of the circumstances -- the whole picture -- must be taken into account. Based upon that whole picture the detaining must have a particularized and objective basis for suspecting the particular person of criminal activity. *See, e.g., Brown v. Texas, supra* at 443 U. S. 51; *United States v. Brignoni-Ponce, supra* at 422 U. S. 884. Cortez, 418.

The Code calls this idea "particularized suspicion." We, specifically adopted the language setting out the two part test in Cortez, to establish whether or not particularized suspicion exists:

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person.

> The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common sense conclusions about human behavior; jurors as factfinders are permitted to do the same -- and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement. *Id.*

The second prong to the test is stated as:

> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. *Id.*

This Court, clearly, supports the Cortez court in its finding that the process of particularized suspicion cannot be based on hard facts. Officers, in the field, have a huge responsibility, based in social policy to protect the community from lawbreakers. They are trained in law enforcement and with experience, learn to make swift determinations in the field. Those determinations, however, must be explainable, whether from firsthand knowledge of the situation or as the Cortez court said, ".. draws inferences and makes deductions -- inferences and deductions that might well elude an untrained person."*Id.*

Those inferences and deductions must be based on a totality of the circumstances. Included in that analysis, must be all information available to the officer at the time. He or she makes the decision to make an investigatory stop "with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers." *Id.*

For other tribal courts, this is not a case of first impression and because of the unique situation of tribes, their incorporation of the ICRA and application of federal and state laws, we looked for cases similarly situated.

In Fort Peck Tribes v Vondall 2 Am. Tribal Law 139, (1999), the appellate court applied the particularized suspicion standard from Cortez to the right against unreasonable search and seizures as stated in the ICRA. The case's facts vary in that the stop was based on a "citizen informant" reporting an intoxicated driver. The Fort Peck Appeals Court found that the citizen's report lacked detail. Without some details, the officers did not have enough information to make a stop.

The Court said:

> "... the citizen informant's report of an intoxicated driver is lacking such detail. Upon what information did the citizen base her report? Are the conclusions (ie. "intoxicated" occupants) based upon an eye witness account or is the citizen reporting the observations of another person? What exactly did the citizen witness observe causing her to believe that the occupants were intoxicated? It is incumbent upon law enforcement to probe into the basis of the report, to extract more information from the informant. After probing, the citizen's report may very well contain sufficient information and detail to be self-authenticating. In the instant case, the officer did not observe any erratic driving or other indications that the driver may be under the influence of alcohol. The only information the officer had was the informant's report and the description of the vehicle. The information at best, created a mere suspicion that an offense was being committed, however, the officer's observation provided no further information to justify an investigatory stop of Vondall. A mere suspicion is not enough to establish probable cause that an offense is being committed. We conclude that, based upon the facts and circumstances within the officer's knowledge at the time, he did not have sufficient information which constituted a particularized suspicion warranting the investigatory stop of Vondall." *Id*, p2-3.

This Court is not saying that to get to particularized suspicion, an officer must be able to answer all of the questions that the Vondall court asked. But the officer must be able to have taken in all the information available, analyzed it, and with experience and training, be able to explain why the officer chose the actions pursued.

In the instant case, we apply the first prong of the test. The analysis must be based on all of the circumstances and information available to the officer. The information the officer received from the reporting party was sparse, at best. The reporting party said a

shot had been fired and he thought one deer had already been taken. There was no explanation as to what the reporting party heard or saw to get to the conclusion that a deer had been taken or that what he heard was a gunshot. If we infer that the reporting party is clear on the sound of gunshots, it is still difficult to get any further in building the totality of the circumstances to stop the red truck. The officer testified that he based his decisions on the notice that shots had been fired. The reporting party said a gunshot had been heard, not multiple shots. The reporting party made known that he lived on Emory Road. The officer and other officers each took a different road to get to Emory Road in their "convergence" on the reporting party's residence. There was no testimony or note in the case report as to why each officer took the road they chose. There are several other roads that converge on or around Emory Road that were not covered by the officers. The reporting party had no description of anything other than the gunshot. He reported no knowledge of the car, its direction, the animal taken, how many people were involved, a description of the people or any other information that would indicate that the possible suspects were driving a red truck on a country road. Only assumptions were made until after the truck had been stopped.

The officer, also, reported that another car had been seen closer to the Emory Road residence but did not explain why the red truck was stopped and not the other car. This Court does not need an explanation as to why the officer did not stop the other car he reported seeing. But we do need, as the lower court needed and the prosecutor had a duty to inform the court, why the officer chose to stop that specific truck. The prosecutor asked the officer,"...is it fair to say that you would have stopped any vehicle that you saw in the area out there at that time?" The officer replied, "Yes."

That intention fails the second prong of the test. From the time of the reporting party's call until the time the truck was stopped, almost ten minutes had elapsed. The intention to stop any car that happened to be out does not make the leap that "the person or occupant of the vehicle has committed, is committing, or is about to commit an offense" as required in 2-2-214 of the Code. Being out on a country road late at night, does not give rise to the suspicion that a person might be poaching. Without any other information to support the stop, the officer did not meet either prong of the test. Both prongs must be satisfied in order to meet the particularized suspicion standard. This Court finds that the failure to meet the standards, made the stop illegal.

Moulton's Motion to Suppress is governed by the Code, specifically in whole:

> **2–2–802. Suppression of evidence**. (1) A defendant aggrieved by an unlawful search and seizure may move to suppress as evidence anything obtained by the unlawful search and seizure. The motion must be filed at least 10 days before trial, unless good cause is shown for waiving this time restriction.
> (2) The motion must specify the evidence sought to be suppressed and the grounds upon which the motion is based.
> (3) When the motion to suppress challenges the admissibility of evidence obtained without a warrant, the prosecution has the burden of proving, by a preponderance of the evidence, that the search and seizure were valid.
> (4) If the motion is granted, the evidence is not admissible at trial.

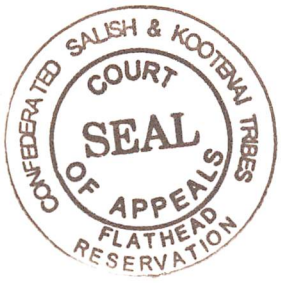
In the instant case, it is CSKT's burden to show that the stop was valid. The testimony of the officer, under questioning from the prosecutor, showed that the officer would have stopped any car he came across. That does not rise to the levels necessary to articulate particularized suspicion. While this Court gives great deference to the lower court as a trier of fact, it is this Court's responsibility to review those determinations in appeals. Had the lower court spelled out its reasoning through a complete Findings of Facts and Conclusions of Law, this Court would have had a better vision of how the trial court saw

and applied the law to the testimony. It did not. In reviewing the record, we find that the officers did not have particularized suspicion to stop Mr. Moulton's truck that night. Without a legal reason to stop the truck, the evidence from a warrantless search of the car is inadmissible.

CONCLUSION

The Tribal Court should have suppressed the evidence found in Mr. Moulton's car because law enforcement lacked particularized suspicion to stop him. In light of that, we REVERSE the lower court's Order Denying Motion to Suppress and REMAND this case back to the lower court for further proceedings consistent with this opinion.

SO ORDERED this 30th of April, 2013.



Eldena N. Bear Don't Walk,
Chief Justice

Daniel Belcourt, Associate Justice

Robert McDonald, Associate Justice

Cc: Laurence Ginnings, CSKT Prosecutor's Office

James Gabriels, Tribal Defender's Office

Certificate of Mailing

I, Abigail Dupuis, Appellate Court Administrator, do hereby certify that I mailed a true and correct copy of the *OPINION* to the persons first named therein at the addresses shown below by depositing same in the U.S. Mail, postage prepaid at Pablo, Montana, or hand-delivered this 2nd day of May, 2013.

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