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Recent Developments

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Revocation of Probation without Preliminary Hearing

In Re Meidingr

In *Morrissey v. Brewer,* 408 U.S. 471 (1972), the United States Supreme Court extended certain due process requirements of the Fourteenth Amendment to proceedings for the revocation of parole. Observing that the "liberty" of a parolee, "although indeterminate, includes many of the core values of unqualified liberty", the Court held that the state interest in its revocation does not justify such state action without some informal procedural guarantees.

In the Court's opinion, the decision to revoke parole involves two distinguishable questions: first, did the parolee violate the conditions of his parole; and second, does such violation require revocation of the parole? In order to guarantee that the parolee receives due process in decisions on both issues, a two-step revocation mode was established in *Morrissey.* The first step requires an initial investigation, or "preliminary hearing", to be conducted "by some person *other* than the one initially dealing with the case" (the Court suggested that another parole officer would be sufficiently uninvolved) for the purpose of evaluating the facts indicating that a violation has occurred. *Morrissey,* 408 U.S. at 485. The parolee must receive notice stating that this preliminary hearing is to take place, its purpose and the alleged violations. He may appear at the hearing and present evidence. The investigating officer should report the evidence which he relies upon in determining that probable cause for revocation exists.

The second step is the revocation hearing at which all contested facts are resolved, and it is decided whether or not revocation of parole is required. The minimum requirements of due process for this second stage are outlined by the Court at 489:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Eleven months after *Morrissey,* the United States Supreme Court decided, in *Gagnon v. Scarpelli,* 411 U.S. 778, 782 (1973), that parole and probation are constitutionally indistinguishable, and held that "a probationer, like a parolee, is entitled to a preliminary hearing and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer.*"

The Supreme Court of Montana reviewed *Morrissey* and *Gagnon* in

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In Re Meidinger, ___ Mont. ___, 539 P.2d 1185, 32 St. Rep. 914 (1975), which arose on a petition challenging state probation revocation procedure. In this case, numerous violations of the conditions of the petitioner's probation had been alleged in a violation report submitted by his probation officer. The county attorney filed a petition for imposition of final judgment with the original sentencing judge. Hearings for the determination of the matter were set and continued on two occasions upon request of counsel for the petitioner. The hearing took place on June 4, and on June 20 the district court ordered revocation of probation for specified reasons.

In deciding the petitions, the Montana supreme court held that the state need not afford the probationer a preliminary hearing, distinguishing *Morrissey* and *Gagnon* on their facts. *In Re Meidinger*, 539 P.2d at 1189:

> Both *Morrissey* . . . and *Gagnon* . . . involved decisions of administrative boards such as Montana's Board of Pardons. The instant case however, involves a probation which was revoked by the original sentencing judge as authorized by section 95-2206, R.C.M. 1947. That distinction in itself provides an inherent sort of fairness which is not achieved through a solely administrative process.

The court also pointed out that Meidinger was not incarcerated until after the final decision revoking his parole had been made, as had been the petitioners in *Morrissey* and *Gagnon*, and said, at 1190:

> In that perspective it is apparent that the requirement of a preliminary hearing was necessary in *Morrissey* and *Gagnon* to insure that some neutral body could hear the evidence and protect the rights of the accused. . . . Where no detention is involved, no such purpose can be served.

The Montana court relied also upon the indication of the United States Supreme Court in *Morrissey* that the procedure applied there was not to be enforced without regard to the facts of the particular case. As support for his reliance on this dicta, Chief Justice Harrison cited *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, the Court dealt with revocation of "good time" as a disciplinary measure in a maximum security prison and held that less formal processes than those required in *Morrissey* and *Gagnon* were due the inmate. In doing so, however, the Court pointed out that the revocation of good time "does not then and there work any change in the condition of the prisoner's 'liberty' ", and noted that such state action is "qualitatively and quantitatively different from the revocation of parole or probation." *Wolff v. McDonnell*, 418 U.S. at 560.

After disposing of the United States constitutional issue in *Meidinger* in this manner, the Montana court turned to state requirements finding that the Montana constitution requires only fundamental fairness, which had been demonstrated; and that the petitioner had wholly failed to show any abuse of discretion on the part of the revoking judge.

The logic of the Montana court in *Meidinger* is elusive. The distinction relied on by the court between revocations before judicial, rather than administrative, officers relates exclusively to the second step in the *Morrissey* procedure, that of final revocation, and yet it is employed to

escape the required first step, preliminary hearing. In addition, the fact that Meidinger was not incarcerated until after the revocation hearing appears to emphasize, rather than alter, the basic fact that this state proceeding involved the question of whether or not the probationer was to be deprived of his liberty on the basis of new wrongdoing. Precisely such proceedings were addressed in *Gagnon,* where a preliminary hearing was required. Finally, in its reliance on *Wolff* the Montana court fails to distinguish between the entirely different factual situation presented there and the minor factual variations of *Meidinger.*

Although Mr. Chief Justice Burger states in *Morrissey* that the procedure it prescribes is not intended to be applied without regard to the facts of the case, it is questionable that the latitude taken by the Montana court was intended, particularly in view of *Gagnon* and *Wolff.* Nonetheless, *In Re Meidinger* establishes that the Montana constitution does not require that a probationer, who is not incarcerated during pendency of probation revocation proceedings, receive a preliminary hearing, when the final revocation hearing is before the original sentencing judge.

L. Randall Bishop

ADMISSIBILITY OF EXPERT OPINION TESTIMONY

McGuire v. Nelson

The courts of this country have begun to take a more liberal view toward the admissibility of expert opinion testimony in products liability cases. The Supreme Court of Montana, in *McGuire v. Nelson,* ____ Mont. ____, 536 P.2d 768, 32 St. Rep. 600 (1975), has allowed Montana to keep pace with this approach.

McGuire involved an action to recover damages for injuries sustained in a motorcycle accident. While the plaintiff was driving the motorcycle down an incline with his wife as a passenger, the front wheel of the motorcycle locked and the plaintiff was thrown over the handlebars and onto the ground. He received a broken pelvis; his wife was not injured.

McGuire originally brought a negligence action against the dealer for selling the wrong size of tire to his wife. McGuire contended that the tire sold, which was larger than that called for in the motocycle's specifications, was forced up against the fender and caused the Honda to stop abruptly. The jury awarded McGuire $45,000 but the supreme court, in the subsequent appeal, ordered a new trial. In so ordering, the court held inadmissable an in-court demonstration by McGuire's expert witness. In the demonstration, the expert had used furniture clamps to demonstrate the force applied to the front suspension. The court could not find a proper foundation to show that the force applied to the suspension by the clamps was similar to the force applied to the suspension by the two riders under the conditions present at the time of the accident.

Prior to the new trial the American Honda Company (Honda) was added as a defendant under the theory that Honda was strictly liable for

marketing a product which was negligently designed, and for failing to warn against the consequences of misuse of that product.

In the new trial, the plaintiff was not allowed to elicit the opinion of his expert concerning the design of the suspension system, the alleged defect, and the cause of the accident. Although the qualifications of the expert were not questioned, the trial court understood the supreme court's decision on the first appeal to mean that the evidence upon which an expert opinion was based had to be related to the place of the accident and to what actually occurred there. In his investigation, the expert in the *McGuire* case had used furniture clamps to take measurements to establish the point at which the suspension system was fully depressed. He had also examined the machine itself, schematic drawings of the suspension system, and the terrain of the accident. The expert had not conducted dynamic tests under field conditions.

The supreme court began by distinguishing between the present appeal and the case previously remanded. The first case was an exclusion of an *in court demonstration* because there was no foundation. It was also a negligence action against a dealer whereas the present case was a strict liability suit against a manufacturer. The court pointed out that there have been no prohibitions declared against static tests if an expert can use the processes in an investigation to establish causation and/or design problems, and noted the specific authorization of opinion testimony on a question of science, art or trade in which the witness is skilled given by § 93-401-27, R.C.M. 1947. Writing for the majority, Justice Daly rejected the argument that such opinion testimony invades the province of the jury; the jury remained free to reject the expert's opinion and rely solely on their own impressions of the evidence presented during the trial.

The court felt that the true test of admissibility in such cases is whether the subject is sufficiently complex so as to be susceptible to opinion evidence, and whether the witness is properly qualified to give his opinion. Finding that the knowledge of motorcycle suspension systems was not a matter of common knowledge, but a question of mechanical engineering, and that the expert was well qualified, the court again reversed and remanded for a new trial.

The place of the opinion of a qualified expert in a strict liability case involving a complex subject seems to be secure in Montana.

Brad Luck

CONSTRUCTION OF RESTRICTIVE COVENANTS IN DEEDS

Higdem v. Whitham

In *Higdem v. Whitham*, ____ Mont. ____, 536 P.2d 1185, 32 St. Rep. 619 (1975), the Supreme Court of Montana reiterated an established guideline for the interpretation of words in deed covenants and stated a new rule for Montana: restrictive covenants in deeds are to be strictly construed, resolving ambiguities in favor of the free use of property.

The case involved a lot in a residential subdivision, the deed to which

contained restrictive covenants providing, *inter alia,* that the purchasers were not to erect any building other than a single detached dwelling house, with or without garage, or other "like and necessary outbuilding" on the lot; and that the purchasers were not to use any building erected on the lot for any purpose other than those incident to the use of a private dwelling house. The expressly stated intention of the latter provision was to prohibit the use of any structure for commercial purposes or keeping of livestock or poultry.

The defendant constructed a large, three-stall garage on his lot and plaintiff, his neighbor, brought suit in the Eleventh District Court, Lincoln County, demanding that the structure be removed. The plaintiff testified at the trial that the defendant had mentioned on two separate occasions that he might do odd jobs as a mechanic in his garage. The defendant testified that his existing one-stall garage had become inadequate for his storage needs, and that storage needs were his only motivation for erecting the new structure. The trial court concluded that the new garage, its size and the purpose intended, were in violation of the covenants and that the garage was not a "necessary outbuilding" and should be removed.

In reversing the trial court's decision, a Montana statute pertaining to contract construction and cases from other jurisdictions were used by the supreme court to establish the meaning of the words "necessary outbuilding" in the covenant. The court referred to *Timmerman v. Gabriel,* 155 Mont. 294, 470 P.2d 528 (1970), in which the construction of deeds had been likened to the construction of contracts. To construe the words in *Timmerman,* the court had utilized § 13-710, R.C.M. 1947. The statute provides that the words of a contract are to be understood in their ordinary and popular sense, unless a legal or technical sense is intended by the parties. Montana had no prior case defining the term "necessary outbuildings", so the court looked to other jurisdictions for a judicial determination of what the word "necessary" ordinarily means in restrictive covenants. The court expressly adopted the holding in (among other cases) *Granger v. Boulls,* 21 Wash.2d 597, 152 P.2d 325 (1944), that the word "necessary" means "convenient to the dwelling". It had been amply shown at the trial, according to the court, that the defendant's new garage was convenient to his dwelling.

The Montana court also found the rules of statutory construction, as expressed in *Dunphy v. Anaconda Co.,* 151 Mont. 76, 438 P.2d 660 (1968) applicable to covenants. The *Dunphy* case held, at 438 P.2d 662, that "where the language of a statute is plain, unambiguous, direct and certain, the statute speaks for itself and there is nothing left for the court to construe". The language of the covenants in this case being, the court said, plain, unambiguous, direct and certain, must be left to speak for themselves. No limitations should be inserted by the court.

The concluding statements of the opinion express a guide for future construction of restrictive deed covenants. Among these concluding remarks, at 536 P.2d 1189, the court says:

> [T]he overriding policy of individual expression in free and reasonable land use dictates that restrictions should not be aided or extended by implication or enlarged by construction.

Mark D. Safty

NECESSITY IN EMINENT DOMAIN: AMOUNT AND EXTENT

Silver Bow County v. Hafer

The Supreme Court of Montana, in *Silver Bow County v. Hafer*, ____ Mont. ____, 532 P.2d 691, 32 St. Rep. 243 (1975), expressly adopted the rule that "a condemning authority cannot acquire a greater interest or estate in the condemned property than the public use requires." *Hafer*, 532 P.2d at 692.

Carl and Patricia Hafer appealed from the order of necessity allowing Silver Bow County to condemn in fee 3.64 acres of their property located at the end of the Silver Bow County Airport runway. The property was allegedly needed to establish a "clear zone" in accordance with Federal Aviation Administration (F.A.A.) regulations. On appeal, the Hafers maintained that the county had failed to demonstrate a necessity for taking in fee.

Before property in Montana can be taken pursuant to the state's right of eminent domain, it must appear that the taking is necessary to a use authorized by law. § 93-9905, R.C.M. 1947. The F.A.A. regulation in question, of which the trial court took judicial notice, distinctly required the establishment of "clear zones" at the ends of runways whenever feasible. 14 C.F.R. § 151.9(a) (1975). The regulation specifically stated, however, that an easement was a sufficient estate if it provided "enough control to rid the clear zone of all obstructions . . . and to prevent the creation of future obstructions; together with the right of entrance and exit for those purposes. . . ." 14 C.F.R. §51.9(c) (1975).

The court in *Hafer*, 532 P.2d at 692, adopted without discussion the following rule:

> It is well established that a condemning authority cannot acquire a greater interest or estate in the condemned property than the public use requires.

The court cited 3 NICHOLS ON EMINENT DOMAIN § 9.2(2) (1965), and several decisions from other states in support of this rule.

The application of this rule to the facts of the *Hafer* case clearly warranted a reversal of the order commanding a taking in fee, since the regulation expressly stated that a fee was not necessary. Nonetheless, the court proceeded to apply the balancing test of *State v. Whitcomb*, 94 Mont. 415, 22 P.2d 823, 826 (1933), which is used to determine the necessity requisite to any condemnation under R.C.M. 1947, § 93-9905. The test requires a balancing of the good resulting from a public taking and use against the injury suffered by the private citizen whose property is taken. The application of the *Whitcomb* test, although unnecessary, mandated

the proper result, namely, a holding that the county failed to demonstrate the necessity for taking the Hafers' property in fee.

The adoption of the *Hafer* rule thus requires those seeking condemnation to establish not only the necessity of taking the amount of property sought, but the necessity of taking the extent of the estate sought in such property as well. The Montana supreme court has found the *Whitcomb* test applicable in determining both types of necessity.

E. Craig Daue

CULTIVATION OF MARIJUANA DEFINED AS SALE

State ex rel. LeMieux v. District Court

In *State ex rel. LeMieux v. District Court of the Fifth Judicial District,* ____ Mont. ____, 531 P.2d 665, 32 St. Rep. 83 (1975), the Supreme Court of Montana ruled on the constitutionality of § 54-132, R.C.M. 1947. The narrow issue of the case was whether the portion of that statute which includes the cultivation of dangerous drugs within the definition of "sale" offended the due process requirements of the Fourteenth Amendment. The supreme court, in a 3-2 decision, held that it did not, emphasizing the power of the legislature to broadly define punishable offenses.

In *LeMieux,* the two defendants were charged with criminal sale of marijuana. The state's evidence showed that the defendants were engaged in the cultivation of some 30 marijuana plants, but failed to show that they had ever, under the common definition of the term, sold it. At the close of the state's case, a motion to dismiss entered by the defendants was granted. The district court ruled that the statute in question raised an irrebuttable presumption that a person who grows marijuana also sells it. The county attorney obtained a continuance, and petitioned for a writ of supervisory control, asking that the district court's action be overruled.

The defendants' contention on appeal was that the inclusion of "cultivation" as a type of "criminal sale" raised a conclusive presumption which was unconstitutionally arbitrary. Citing *Tot v. United States,* 319 U.S. 463 (1943), they argued that a rational basis for concluding sale of marijuana from mere cultivation could not be found. In the supreme court's opinion, however, the rational basis argument was never resolved. The court held that the statute did not create a presumption at all, but merely "defined a criminal offense in terms of several types of conduct which may constitute that single offense." *LeMieux,* 531 P.2d at 667. The majority felt that enactment of such a broadly inclusive statute was well within the legislative power.

The outcome in *LeMieux* clearly turned on statutory construction. The majority construed the language of the statute as a definition, while the minority found in the same language a conclusive, and unconstitutional, presumption. The Montana statute on construction of penal statutes, § 94-1-102, R.C.M. 1947, does not adopt the common law rule of strict construction. It only requires that such a statute be construed "according

to the fair import of its terms, with a view to effect its object and promote justice." Analysis of the Montana Dangerous Drug Act, Title 54, R.C.M. 1947, shows that the decision in *LeMieux* does little to promote the legislative philosophy of Montana drug laws.

The argument against the statute's inclusive definition is compelling. The punishments provided by the Dangerous Drug Act are graduated in order to deal less harshly with users of drugs than with sellers. The penalties vary from up to one year in the county jail and up to a $1,000 fine, with mandatory deferred imposition for minors, to a possible life sentence for criminal sale. It is clear that the distinction in severity of penalties is based on the element of trafficking in drugs. This conclusion is further strengthened by the passage in the 1975 session of the Montana Legislature of a Possession with Intent to Sell statute, § 54-133.1, R.C.M. 1947, with a penalty of up to 20 years imprisonment, compared with only 5 years for possession with no intent to sell. In the context of a Dangerous Drug Act with such a clearly expressed object of punishing sale more harshly than mere possession, it is difficult to understand why the defendant who has cultivated, but not sold, should be precluded from proving that his action should be punished as mere possession.

The conclusion cannot be escaped that when the Montana Legislature wanted to prohibit cultivation of marijuana, it chose an unfair and inconsistent method of doing so. The majority opinion in *LeMieux* suggests that the legislature could enact a separate statute prohibiting cultivation. Given the reluctance of the supreme court to liberally construe the existing statue, further legislative action consistent with the punitive objectives of the Dangerous Drug Act is clearly called for.

Christian D. Tweeten

Uniform Reciprocal Enforcement of Support Act and the State's Right To Reimbursement from Funds Collected Thereunder

State v. Hultgren

In light of the myriad of problems involved in collecting support and maintenance, the 1969 Montana legislature adopted the Uniform Reciprocal Enforcement of Support Act (URESA) § 93-2601-1 *et. seq.*, R.C.M. 1947, in an effort to provide additional remedies for enforcement of duties of support. Although some provisions for criminal remedies are included, URESA is essentially a civil procedure, the source of its greatest effectiveness being in its interstate application. By definition an obligee includes "a state or political subdivision to whom a duty of support is owed" and § 93-2601-48, R.C.M. 1947, further provides:

> If a state or a political subdivision furnishes support to an individual obligee it has the same right to initiate a proceeding under this act as the individual obligee for the purpose of securing reimbursement for support furnished and of obtaining continuing support.

Coupled with § 61-115, R.C.M. 1947, which states:

> If a parent neglects to provide articles necessary for his child under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent.

the law seems clear that public welfare agencies are entitled to reimbursement for Aid to Dependent Children (ADC) funds expended on behalf of an individual who thereafter collects payment of support arrearages. However, the November, 1975, decision of the Supreme Court of Montana in *State v. Hultgren*, ____ Mont. ____, 541 P.2d 1211, 32 St. Rep. 1091, is to the contrary.

The defendant and appellant, Roxanne Hultgren, applied for and received ADC payments for a lengthy period of time, stating her children were without support. After personally initiating URESA proceedings, she successfully recovered support arrearages of $4,900.00, which sum was held by the court pending a determination as to whether the Department of Social and Rehabilitation Services or Ms. Hultgren was entitled to the money. Judgment was granted for the state agency, and Ms. Hultgren appealed.

Although the supreme court upheld the state's contention that it possessed the right to initiate URESA proceedings or join in any such proceedings initiated by the individual obligee, it did not find that § 93-2601-48, R.C.M. 1947, served as a basis for an action against the individual obligee:

> The State did not choose to initiate a URESA proceeding or join in defendant's action, therefore, it cannot now claim the benefit of this section to recover from defendant, having voluntarily waived the right granted thereunder.

And, even though the court found the state "may properly be held to be a 'person' for the purposes of § 61-115, R.C.M. 1947", there was no showing that the Department of Social and Rehabilitation Services was attempting to recover from the neglectful parent.

The state further argued that the proceeds should be recoverable under the doctrine of equitable subrogation. But the court, citing 83 C.J.S. Subrogation, § 6, held that subrogation is not allowed where an adequate remedy at law exists. Sections 93-2601-48 and 61-115, R.C.M. 1947, provide adequate legal remedies. In this instance, the first was waived when the state failed to initiate a URESA proceeding or join in Mrs. Hultgren's proceeding, and the second remedy is available, but the cause of action is against the neglectful parent.

The effect of this ruling is to require the state, or a political subdivision thereunder, to join in the filing of all URESA proceedings involving ADC recipients, if the state wishes to be reimbursed.

Sandra S. Johnson

Authority To Issue Search Warrants

State v. Tropf and *State v. Snider*

During 1975 there were three significant developments defining the authority of city and justice of the peace courts to issue search warrants. First, the Montana supreme court in *State v. Tropf*, ___ Mont. ___, 32 St. Rep. 56 (1975), found police court judges had no authority to issue search warrants. Second, a 1975 legislative amendment gave police court judges the same jurisdiction and responsibility as justices of the peace in handling search warrants. Third, in *State v. Snider*, ___ Mont. ___, 32 St. Rep. 1056 (1975), a case arising before the 1975 amendment but decided after its passage, the Supreme Court of Montana upheld the authority of justices of the peace to issue search warrants in drug cases.

Tropf involved an appeal from an order of the district court, Cascade County, suppressing crucial state's evidence supporting an information charging possession of marijuana in excess of 60 grams. The evidence was obtained in a search of the defendant's home and yard. On the day of the search in question there were no district judges present in the courthouse. A Great Falls police detective submitted a complaint and affidavit to a city police judge, who upon hearing sworn testimony in support of the complaint and affidavit, signed the search warrant. The warrant on its face appeared to be issued by a district court. Armed with the warrant, detectives searched Tropf's house and found numerous plastic bags containing marijuana residue, some marijuana seeds, and drug use paraphernalia. In a hole in the backyard approximately three pounds of marijuana were discovered.

The district court found the search warrant was fatally defective for the following reasons:

> (1) The person signing the warrant was without lawful authority to issue a warrant out of the district court of the Eighth Judicial District in that he is not a district judge of that court.
> (2) The affidavit and complaint on which the warrant was issued were not retained by the judge as required by § 95-706, R.C.M. 1947.

On appeal the state argued that § 95-206, R.C.M. 1947, together with § 95-704, R.C.M. 1947, authorize a police judge to issue search warrants. Section 95-704 states: "Any judge may issue a search warrant." The term "judge" is defined in § 95-206 as:

> "Judge" means a person who is invested by law with the power to perform judicial functions and includes court, justice of the peace, or police magistrate *when a particular context so requires.* [Emphasis added].

The supreme court answered that police courts are courts of limited jurisdiction and such courts have only that authority which is expressly conferred upon them. Section 11-1602, R.C.M. 1947, at the time of *Tropf*, defined the subject matter jurisdiction of a police court and gave no express authority to issue search warrants. The court reasoned that the term "judge" does not require the inclusion of a police magistrate as a person

authorized to issue search warrants, ruled the search warrant in this case void, and upheld the suppression of evidence by the district court.

The 1975 legislature passed an amendment establishing city courts and renaming police courts as city courts, § 93-411, R.C.M. 1947. Another 1975 amendment gave city court judges the same jurisdiction and responsibility as justices of the peace in handling applications for search warrants:

> . . .(3) Application for search warrants and complaints charging the commission of a felony may be filed in the city or town court and when they are so filed the city judge shall have the same jurisdiction and responsibility as a justice of the peace, including the holding of a preliminary hearing. The city attorney may file an application for a search warrant or a complaint charging the commission of a felony when the offense was committed within the city limits. The county attorney, however, must handle any action after a defendant is bound over to district court. § 11-1602, R.C.M. 1947.

This statute provides a city court judge with authority to issue search warrants concurrently with justices of the peace.

The authority of justice courts to issue search warrants was challenged in 1975. The challenge was in a case arising before the passage of the city court legislative amendments, but decided by the Supreme Court of Montana after passage of the amendments. In *State v. Snider,* ____ Mont. ____, 32 St. Rep. 1056 (1975), a search warrant issued by a justice of the peace was challenged, upheld by the district court, and on appeal upheld by the Montana supreme court. In this case, a Lewistown justice of the peace issued a search warrant on the basis of a sworn application by a Fergus County deputy sheriff. The warrant authorized any peace officer of the state to search a certain described house in Lewistown for marijuana and other drug substances. A search of the house produced illicit drugs and the Fergus County Attorney brought felony charges for illegal possession of dangerous drugs.

Prior to trial, Snider moved to suppress all evidence obtained from the house pursuant to the search warrant. Following a hearing, the district court denied the motion to suppress and the defendant was convicted. One of the issues on appeal was whether denial of the defendant's motion to suppress was reversible error. Defendant contended that a justice of the peace has no jurisdiction or authority to issue search warrants for dangerous drugs. Referring to *Tropf,* the supreme court reasoned that a justice of the peace does not stand on the same footing as a police judge when it comes to issuing search warrants. Unlike a police magistrate, they found a justice of the peace is included within the term "any judge" in § 95-704, R.C.M. 1947, in the context of issuing search warrants.

Basic differences were mentioned by the court in justifying its distinction between police and justice courts. Among these distinctions were: (1) justice courts are constitutionally created while police courts are statutorily created and (2) the legislature had given justice courts the power to act as examining courts in felony cases, while such power had not been granted to police courts at the time this case arose.

In upholding the authority of a justice court to issue search warrants,

the court found that the legislature intended to include the power to issue search warrants within the grant of power to act as examining courts. They found this from legislative history coupled with Montana's existing judicial structure. They noted that under former § 54-112, R.C.M. 1947, justices of the peace did not have jurisdiction to issue search warrants relating to illegal possession of drugs. In 1969, however, the legislature passed the present Dangerous Drugs Act which does not limit the issuance of search warrants to district judges, or to any particular type of judge. Section 54-138, R.C.M. 1947, now provides: "The district court shall have exclusive *trial jurisdiction* over all prosecutions commenced under the Montana Dangerous Drugs Act." [Emphasis added]. The court reasoned that the use of the term "trial jurisdiction" constituted legislative acknowledgment that other types of jurisdiction exist in these cases which are not vested exclusively in the district courts. Further, the court reasoned that perhaps the clearest indication of how the legislature itself treated the subject was the 1975 amendment giving city judges the same jurisdiction and responsibility as justices of the peace in handling applications for search warrants.

The court noted that their construction was also consistent with the United States constitutional guarantees requiring a "neutral and detached magistrate" to examine the application for a search warrant and determine whether a reasonable cause exists for its issuance.

In both *Snider* and *Tropf* the court also issued a warning by expressing its disapproval of a search warrant directed to "any peace officer of this state," and recommended that this practice be discontinued and the warrants be directed to a particular officer. In neither case, however, was this defect itself found fatal to the validity of the search warrant.

Although *Tropf* denied the authority of a police court judge to issue search warrants, this denial was on the basis of the existing statutory grant of jurisdiction to police courts. The 1975 legislature granted city (police) courts concurrent jurisdiction with justice courts, including power to hold preliminary hearings in felony cases and power to issue search warrants. The authority of justice courts to issue search warrants in drug cases was subsequently upheld by *Snider*. Consequently, both city courts and justice courts have concurrent jurisdiction, even in drug cases, to issue search warrants.

Nicholas C. Spika

Fishing Rights on the Crow Reservation

United States v. Finch

On October 13, 1973, the Crow Tribe of Indians issued a Tribal Ordinance prohibiting non-Tribal members from fishing within the exterior boundaries of the Crow Indian Reservation. On May 5, 1974, James Junior Finch was arrested while fishing in the Big Horn River from a Montana Fish and Game Commission access site. An information pursuant to 18 U.S.C. 1165 was filed, charging Finch with fishing in a river on Indian trust

land closed to hunting and fishing by any non-Crow citizens.

On April 9, 1975, in *United States v. Finch,* 395 F. Supp 205, 32 St. Rep. 364 (D. Mont. 1975), Federal Judge James Battin ruled the information insufficient on its face and ordered it dismissed. An analysis of Judge Battin's holding reveals three specific rulings of significance.

(1) After a review of pertinent treaties and the nature of the Crow Tribe's title, Judge Battin specifically overruled a prior order in this case and his holding in *United States v. Haug and Mill,* D. Mont., Billings Div., Misc. Crim. No. 511 (June 9, 1971) that the Big Horn River bed is held by the United States in trust for the Crow Tribe. Judge Battin held that neither the Treatey of Fort Laramie of 1851 nor the Treaty with the Crow Indians of 1868 made specific reference to the title of the Big Horn River bed. He found that the Big Horn River, as a navigable river, ought to be subject to the rule for disposal of the beds of navigable streams as stated in *United States v. Holt State Bank,* 270 U.S. 49 (1926). In *Holt,* the Supreme Court said that the United States regards land under navigable waters as held for the benefit of future States and would not recognize disposals otherwise save in exceptional instances where the intention was made very plain. Judge Battin distinguished *Choctaw Nation v. Oklahoma,* 397 U.S. 620 (1970), where the Choctaw Nation was given title to land underlying a navigable stream. In *Choctaw Nation,* the practical question was one of ownership of minerals under the river bed and, in a treaty with the U.S., the Choctaws were specifically and expressly promised that no part of the land granted to them would ever be embraced by any territory or state. No similarly explicit grant was made to the Crow Tribe. The judge concluded that the treaties involved in the *Finch* case more closely approximate the *Holt* case than the *Choctaw Nation* case, thus holding that the bed of the Big Horn River was not land held in trust by the United States for the Crow Tribe.

(2) The court further held that even if the United States held the bed of the Big Horn River in trust for the Crow Tribe, the information would be dismissed on the ground that the defendant was standing on land belonging to the State of Montana and as an owner of land adjacent to a navigable stream, the state has riparian rights. The plaintiff cited *United States v. Pollmann,* 364 F. Supp. 995 (D. Mont. 1973) in its argument but the court distinguished *Pollmann* from *Finch.* In *Pollmann,* the defendant was fishing from a boat on a portion of Flathead Lake which is held in trust for the Confederated Salish and Kootenai Indian Tribes. In *Finch,* the defendant was fishing from property owned by the State of Montana. The court, therefore, found no trespass upon Indian land, an essential element for an offense under 18 U.S.C. 1165.

(3) The third significant holding in the *Finch* case was directed to the question of the sovereignty of the Crow Tribe. Judge Battin held that the Crow Tribe did not have the power to issue the October 13, 1973 ordinance and so declared the ordinance invalid. Once again the judge looked to the wording of the treaties and found no grant of *exclusive* rights to hunting or fishing in the Crow Tribe. He recognized that if, historically, a tribe was composed of fishermen and derived its food supply from fishing, exclusive

fishing rights in accustomed aboriginal places might be implied from the grant of the reservation. The conclusion was that there was insufficient evidence in the *Finch* case to place the Crow Tribe in such a category. The opinion emphasized that when treaties do not expressly create an exclusive right to fish and when such treaties cannot reasonably be construed by implication to create such a right, a court has no power to create that right.

United States v. Finch is currently on appeal in the Ninth Circuit Court of Appeals. The present holding reinforces the rights of the State of Montana over its navigable waterways, absent clear and direct statutory or treaty language to the contrary, and the right of the public to fish those waterways. In so holding, the district court's opinion restricts the sovereignty of the Crow Tribe; the Crow Tribe has neither the exclusive fishing rights over navigable waterways passing through the Crow Indian Reservation nor may the Tribe prohibit fishing from non-Indian land located within the exterior boundaries of the reservation. It once again becomes apparent that, as Judge Smith noted in *United States v. Blackfeet Indian Reservation*, 369 F. Supp. 562 (D. Mont. 1973), ". . . an Indian Tribe is sovereign to the extent that the United States permits it to be sovereign —neither more nor less."

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