

IN THE SUPREME COURT
OF THE MISSISSIPPI BAND
OF CHOCTAW INDIANS

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No. SC 2002-3

Mississippi Band of)
Choctaw Indians,)
Complainant-Appellee,)
)
V.)
)
Merlin Henry,)
Defendant-Appellant.)

OPINION
AND
ORDER

FILED

JUN 09 2005

CHOCTAW SUPREME COURT
BY: *Melissa Turner*
COURT CLERK

Appearances: Donald L. Kilgore, for the Appellant-Defendant, Merlin Henry; and
Terry L. Jordan, for the Mississippi Band of Choctaw Indians.

Before: Rae Nell Vaughn, C.J., Carey N. Vicenti, A.J., and Frank R.
Pommersheim, A.J.

C. N. Vicenti, Associate Justice, for a unanimous Court.

This case comes before this Court upon a Notice of Appeal pursuant to Title VIII,
Section 7-1-3, from a decision rendered on October 3, 2002. This Court accepted this
case for review, considered the briefs of the parties and heard oral argument. Having fully
considered the facts and relevant law this Court holds in favor of the Appellant¹, Merlin
Henry, however, doing so for other reasons as described below.

I. Jurisdiction.

The decision of the trial court was entered on October 3, 2002. This appeal was
filed on November 1, 2002. In accordance with Section 7-1-3 (a) C.T.C., this being an
appeal that was filed within the timeframe prescribed therein, therefore, this Court has
jurisdiction to hear this case.

¹ As this matter proceeded to oral argument the Mississippi Band of Choctaw Indians conceded that the
Defendant-Appellant's right to be free from self-incrimination was infringed. Defendant-Appellant also
admitted that he was guilty of the charge of Careless Driving.

II. Summary of the Facts.

On December 2, 2001, at approximately 1:26 a.m., the Defendant-Appellant, Merlin Henry, was observed by an officer of the Choctaw Police Department encountering a T intersection. Upon executing a turn, the car driven by Mr. Henry went into the other lane. As a result of this unusual execution of the turn, the car was pulled over by the police officer. Upon encounter with Mr. Henry the police officer detected indicators that Mr. Henry may have been under the influence of alcohol as he operated the vehicle. He was not, however, asked or required to perform any number of exercises commonly known as 'field sobriety tests'. When asked to submit to a breath test, Mr. Henry refused to take that test. He was then arrested and charged with Driving under the Influence, Failing to Use Signal Device and Careless Driving.

As the case was tried before the trial court on October 3, 2003, evidence and testimony was presented. In his defense. The Appellant provided no testimony. After the court heard the case the trial court judge, in delivering the verdict of the court stated:

Since he was able to respond during the time he was offered the intoxicator (sic) test, he should have taken it. Then, that way, he would have proof that he was not under the influence or he was not intoxicated at that point. So, he is guilty of driving under the influence of intoxicating liquor.

Transcript at 35.

The verdict found the Appellant guilty of Careless Driving and Driving Under the Influence. A sentence was then imposed.

III. Discussion.

A. Standard of Review.

The standard of review in the consideration of an appeal in a criminal matter is whether "in light of the evidence as a whole, no reasonable, hypothetical juror could find, beyond a reasonable doubt, that the Defendant was guilty". *Mississippi Band of Choctaw Indians v. John*, CS 2001-12 (July 29, 2003). We note that the parties have conceded various positions that, in essence, admit that there were no erroneous findings of fact. In a case such as this the question is whether the trial court judge made a clearly erroneous application of the law.

B. The Applicable law.

The heart of this appeal lies not in the statement of the trial court judge regarding the Appellant's failure to take a breathalyzer test, as it would appear to be on the surface. The Mississippi Band of Choctaw Indians as Appellee readily concedes that Appellant's rights against self-incrimination were compromised inasmuch as the trial court judge construed the Appellant's silence to be a failure to prove innocence. *Griffin v. California*, 380 U.S. 609, 613-614, 85 S. Ct. 1229, 14 L.Ed. 2d 106 (1965), *Yarbrough v. State*, 70 Miss. 593, 12 So. 551 (1893). While both parties to this case concede the substantive limitations on a judge's assumptions, the larger question asks the source of such requirement.²

The Revised Constitution and Bylaws of the Mississippi Band of Choctaw Indians forms the basis for the analysis of this question. Article X, Section 1 (d) states that "[t]he Mississippi Band of Choctaw Indians, in exercising powers of self-government shall not...[c]ompel any person in any criminal case to be a witness against himself." Additionally, the Choctaw Tribal Code under Title II, Choctaw Rules of Criminal Procedure, Rule 3 (i), provides that criminal defendants have "all other rights and protections which the Choctaw Court may from time to time determine to have been conferred upon the defendant by the Indian Civil Rights Act of 1968, 25 U.S.C. Section 1301 et seq., (as amended Pub. L. 99-570, Title IV, Section 4217, October 27, 1986)."

The Indian Civil Rights Act (ICRA), although passed under the auspices of American federal law, is clearly an external law expressed by a separate sovereign. Even the United States of America recognizes this as the state of the law. *See, e.g., Talton v. Mayes*, 163 U.S. 376 (1896). The ICRA enumerates a set of rights which have a counterpart under Choctaw law under Article X of the Tribes Constitution. Rule 3 (i) of the Rules of Criminal Procedure recognizes openly that although the language used to describe those rights is the same, inasmuch as the ICRA purports to allow defendants to test the validity of their incarceration under tribal law, on occasion, a federal court may

² The Appellant correctly identifies Article X, Section 1 (d) of the Tribe's Constitution as the basis for analysis her, however, erroneously identifies Article III and a non-existent Section 26 within that Article as the basis for his argument. The Appellee argues that the Appellant erroneously relied upon the Fifth Amendment to the United States Constitution and to Mississippi State law for its position.

determine the ICRA to give a different scope or range to those stated rights. In other words, even though the language may be equivalent, the interpretation may not. Rule 3 (i), thus, incorporates into Choctaw law the judicial discretion “from time to time” to determine whether federal ICRA jurisprudence conveys any additional protections to the rights of persons in criminal proceedings. This accords with Article X, Section 2 of the Choctaw Constitution wherein it states that “[t]he privilege (sic) of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of the tribal court.”³

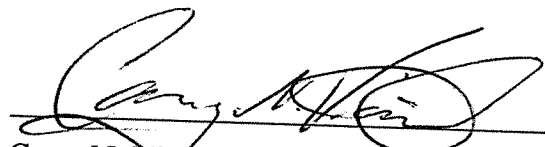
This Court does not interpret the Appellant’s argument to require the application of Mississippi State Constitutional or statutory law, but that the Appellant merely argues analogously to such law. Nothing in the Tribe’s Constitution requires or allows such application.

The Appellant has admitted to having been correctly convicted by the trial court to the charge of Careless Driving, thus, this Court affirms the conviction.

IV. Conclusion.

In accordance with foregoing discussion this Court affirms the ruling of the trial court on the verdict that the Appellant, Merlin Henry, was found guilty of the charge of Careless Driving and remands this matter for execution of the judgment. The verdict of guilt on the charge of Driving under the Influence of Intoxicating Liquors, however, is reversed.

IT IS SO ORDERED, this 8th day of June, 2005.


Carey N. Vicenti, Associate Justice

³ Article X, taken together with the ICRA and Rule 3 (i), recognizes the practical interaction that may take place between the federal government and the government of the Mississippi Band of Choctaw Indians. In the event that federal ICRA jurisprudence is deferential to tribal jurisprudence, Choctaw jurisprudence will provide a majority of guidance in determining the breadth and scope of civil rights protection. If, however, federal ICRA jurisprudence actively challenges tribal jurisprudence, the Choctaw Courts may defer to the federal court views.