

FILED

MAY 24 2005

CHOCTAW SUPREME COURT
BY: *Melissa Aubrey*
COURT CLERK

**IN THE SUPREME COURT
OF THE MISSISSIPPI BAND
OF CHOCTAW INDIANS**

Mississippi Band of Choctaw Indians,)	SC 2004-9
Plaintiff/Appellee,)	
v.)	MEMORANDUM OPINION
)	AND
Mack Hayes Anderson,)	ORDER
Defendant/Appellant.)	

Per Curiam (Chief Justice Rae Nell Vaughn and Associate Justices Frank Pommersheim and Carey Vicenti)

I. Introduction

At approximately 1:00 a.m. on June 11, 2004, Mississippi Band of Choctaw police responded to an alleged disturbance involving Mack Hayes Anderson, Defendant-Appellant herein, at or near the Percy Solomon residence in the Conehatta Community. Several individuals on the scene, though drinking themselves, alleged that Mack Hayes Anderson was intoxicated and that he had assaulted Pat Solomon, but had driven away from the Solomon residence in his pickup truck. The investigating officers on the scene apparently detected the smell of alcohol on the person of Pat Solomon and advised him that he should wait until the next day before traveling to the Choctaw Police Department to file a written complaint against Mr. Anderson for the alleged intoxication and assault.

Based on this information, Officers York and Williams set off to find Mr. Anderson. Approximately ten minutes later the officers saw Mr. Anderson's pickup truck parked outside the Eula Anderson residence. The officers apparently obtained the consent of Ms. Eula Anderson to search the premises for Mr. Anderson. The officers located Mr. Anderson in the back part of the house and informed him that he was under arrest for intoxication. In effectuating the arrest, a scuffle ensued between Mack Hayes Anderson and the arresting officers. The scuffle resulted in additional charges namely battery and resisting arrest.

At a bench trial, the Honorable Donna Morris found defendant Anderson guilty of intoxication, a class "C" offense, two counts of battery, a class "B" offense, and resisting arrest, a class "B" offense. Judge Morris sentenced the Defendant to 135 days in jail. After Defendant's motion for reconsideration was denied, he filed a timely notice of appeal.

The appeal was fully briefed and oral argument was held on March 7, 2005.

II. Issues

The appeal in this case raises two issues namely, (1) whether the trial court erred in determining that the warrantless arrest of the defendant was lawful under the Mississippi Band of Choctaw Indians Constitution and (2) If so, whether the warrantless arrest complied with Mississippi Band of Choctaw Rule of Criminal Procedure 6.

Each issue will be discussed in turn.

III. Discussion

A. Tribal Constitution

The Mississippi Band of Choctaw Indian's Constitution expressly incorporates the provisions of the Indian Civil Rights Act of 1968 including the protection against illegal search and seizure.¹ In the context of arrest, this means that no arrest of a defendant may take place without an arrest warrant supported by a finding of probable cause. A warrantless arrest is permitted in limited circumstances that are discussed below.

Warrantless arrests are only permitted in those circumstances when an offense has been

¹ See e.g. Art. X of the Mississippi Band of Choctaw Indians Constitution that provides, in relevant part, that:
Sec. 1. The Mississippi Band of Choctaw Indians, in exercising powers of all government shall not:
(b) Violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

committed in the *presence* of the arresting officer and/or there are other exigent circumstances.² This is especially true in the home, where there is a heightened expectation of privacy and repose. *Payton v. New York*, 445 U.S. 573 (1980). Under no circumstances, may an arrest be made without probable cause.

In the case at bar, it would therefore appear that the arrest of the Defendant, Mr. Mark Hayes Anderson, did *not* comport with these Tribal Constitutional requirements. The arresting officers did not have a warrant and they had not observed the Defendant commit any offense in their presence prior to entering the Anderson residence. In short, probable cause was apparently lacking.

Yet because of the unique facts of this case, the *apparent* breach of Tribal constitutional requirements is not an *actual* breach of these guarantees. This is so because of the unusual nature of the offense of "intoxication" under Mississippi Band of Choctaw Tribal law. The offense is defined at § 3-6-21 of the Tribal Code as follows:

It shall be lawful for any person to be found in a drunken or intoxicated condition *anywhere within the limits of this jurisdiction*, a person shall upon conviction be deemed guilty of a Class C offense. For purposes of this section, an adult shall be presumed to be intoxicated if he submits to a breathalyzer test and his blood alcohol content tests is equal to or greater than .10%. A minor shall be presumed to be intoxicated if he submits to a breathalyzer test and his blood alcohol content test is equal or greater than .02%. (emphasis added).

Thus, the offense of "intoxication" can be committed "anywhere within the limits of this jurisdiction" and is not limited to the public sphere, but can take place in private as well. Therefore, when officers on the scene obtained consent³ to enter the Anderson residence, they were able to observe Mr. Anderson's (alleged) "intoxication" *in their presence* and hence did not need a warrant to effectuate the arrest. The ensuing scuffle that resulted in the additional charges obviously took place in their presence since the officers were the alleged victims.

In most other instances where the target offense that invokes police pursuit does *not* manifest

² See discussion of Choctaw Rule of Criminal Procedure 6(b)(1) and 6(b)(2) *infra* at pp. 4-5.

itself in the physical condition of the defendant, such an arrest would *not* comply with the Tribal Constitutional guarantees described above. For example, if the sole (unwritten) allegation against Mr. Anderson was that he committed an assault,⁴ a Class "C" offense like intoxication, outside the presence of law enforcement officers, there would be *no* basis for effectuating his arrest without an arrest warrant.

Obviously, any allegation of wrongdoing should be thoroughly *investigated* by police in order to develop sufficient probable cause to obtain an arrest warrant. Nevertheless, a mere allegation standing alone is not sufficient to justify an arrest because it is outside what the Tribal Constitution permits.

B. Choctaw Rule of Criminal Procedure 6

Choctaw Rule of Criminal Procedure 6 permits warrantless arrests in two sets of circumstances.

When a class "A" or "B" offense is committed, a warrantless arrest is permitted as follows:

- (1) For Class A or B criminal offenses committed in the officer's presence;
- (2) When the officer has probable cause to believe the person to have committed a Class A or B offense although not in the officer's presence, and there is reason to believe that such person may:
 - (i) flee the jurisdiction or conceal himself or herself to avoid arrest; or
 - (ii) destroy or conceal evidence of the commission of an offense; or
 - (iii) injure or threaten another person or damage property belong to another person.

The case at bar involves "intoxication," a Class "C" offense, and therefore a warrantless arrest is not permitted as above described under 6(b)(1) or 6(b)(2), but only if in accordance with Rule 6(b)(3):

³ The existence of consent to enter the Anderson residence is not challenged by either party.

⁴ At § 3-3-2 of the Tribal Code assault is defined as:

Any person who shall willfully attempt to commit a battery or intentionally place another in apprehension of receiving an immediate batter or threaten bodily harm to another person through unlawful force or violence shall be guilty of simple assault. Assault is a Class C offense.

- (3) Upon the verbal complaint of another person that an offense has been committed, that the person being arrested committed it, that the defendant's remainder at liberty until a warrant of arrest could be secured would pose a threat of injury or damage to another person or property, and that the person making the verbal complaint will inmediately [sic] and in no event later than eight hours subsequent to the arrest initiate criminal charges against the arrestee.

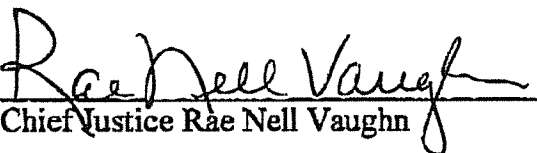
Rule 6 (b)(3), as written, is plainly *unconstitutional* in that it does not appear to require the existence of probable cause at the time of arrest.⁵

IV. Conclusion

Based on the unique facts of this case, the conviction of the Defendant is affirmed. Yet the Court strongly urges the Tribal Council to revisit Criminal Rule of Procedure 6 in order to correct its constitutional infirmities.

IT IS SO ORDERED.

For the Court


Chief Justice Rae Nell Vaughn

Dated: May 24, 2005

⁵ In addition, this section also requires the person making the "verbal complaint" to "initiate criminal charges against the arrestee" within "eight hours subsequent to the arrest." But what if the complainant doesn't? Or what if the charges do not rise to the level of probable cause? The rule does not answer these questions and therefore is void for vagueness as well.