IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

MISSISSIPPI BAND OF CHOCTAW INDIANS — Respondent-Appellee

VS. — SC 2011-01

ZORRO CLAYTON — Petitioner-Appellant

BEFORE: Chief Justice Hilda F. Nickey, Associate Justice Robert Jones and Associate Justice Brenda Toineeta Pipestem

FOR THE COURT: Brenda Toineeta Pipestem, Associate Justice

OPINION

Petitioner filed the Notice for a Writ of Habeas Corpus with the Choctaw Supreme Court on June 1, 2011[1] and the Court heard oral arguments on July 21, 2011. Petitioner asserts that the Indian Civil Rights Act of 1968 (ICRA), 25 U.S.C. §1301-1303, was violated by the "Tribal Attorney General's common practice of unconstitutional stacking in sentencing" that resulted in Clayton being sentenced to thirty (30) months in the Smith John Justice Complex, Choctaw, Mississippi." The petitioner's request to release Clayton from detention pending oral arguments was denied on June 15, 2011, and a hearing was scheduled for July 21, 2011. For the reasons that follow, we deny the petition for a writ of habeas corpus.

FACTS

Following the Deferred Fine and Sentencing hearing for Mr. Clayton held on January 20, 2010, the Choctaw criminal court issued its written order on February 1, 2010. The hearing and written order covered four separate criminal cases: CR 2008-191; CR 2008-91; CR 2008-224; CR 2010-0039. In each of the four cases, Mr. Clayton waived his right to an attorney and pled guilty to all the charges under each case on January 13, 2010. The charges and sentencing for each case is as follows:

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[1] The Court takes notice that petitioner's request for a Writ of Habeas Corpus is one paragraph long, and it does not identify the relevant facts or make legal arguments to support the request. The Court granted the petitioner's request for a hearing, but future petitions and/or court briefs should not fail to identify the relevant facts, issues, and legal arguments supporting counsel's position.

- CR 2008-191
  - Aggravated Battery, Class A (incident date: January 1, 2008)
    - Clayton sentenced to 6 months in jail and $500 fine.
  - Disobedience to Lawful Order of Court-Failure to Appear at Trial Class B on April 13, 2008
    - Clayton sentenced to 3 months in jail and $250 fine.

- CR 2008-91
  - Aggravated Battery – Class A (incident date: January 15, 2008).
    - Clayton sentenced to 6 months in jail and $500 fine.
  - Theft, Class A
    - Clayton sentenced to 6 months in jail and $500 fine.
  - 2 Class B Offenses:
    1. Criminal Trespass-Building Class B (incident date: January 15, 2008).
    2. Disobedience to Lawful Order of Court- Failure to Appear at Trial Class B on April 14, 2008
    - For 2 Class B offenses, Clayton was sentenced a total of 6 months (with 3 months suspended) in jail. For each class B offense Clayton was fined $250 for a total of $500 (with $250 suspended).

- CR 2008-224
  - Escape, Class B (incident date: February 26, 2008)
    - Clayton sentenced to 3 months in jail and $250 fine.

- CR 2010-0039
  - Intoxication, Class C (incident date: January 5, 2010)
    - Clayton sentenced to 1 month in jail and $100 fine.
  - Disorderly Conduct, Class C (incident date: January 5, 2010)
    - Clayton sentenced to 1 month in jail and $100 fine.
  - Resisting Arrest, Class B (incident date: January 5, 2010)
    - Clayton sentenced to 3 months in jail and $250 fine.
  - Carrying a Concealed Deadly Weapon, Class B (incident date: January 5, 2010)
    - Clayton sentenced to 3 months in jail and $250 fine.

No further motions or pleadings were filed on these cases prior to petitioner's Notice for a Writ of Habeas Corpus.

ANALYSIS

1. Petitioner's Request for a Writ of Habeas Corpus is not premature.

Respondent opposes petitioner's request for a writ of habeas corpus as premature and not ripe for consideration by this Court. Specifically, respondent's position is that the matter

be remanded back to the trial court for further consideration under the exhaustion of remedies doctrine. Under Article 10, Section 2 of the Mississippi Band of Choctaw Indians (MBCI) Tribal Constitution of 1975, as amended, petitioner is not required to fulfill any conditions precedent prior to requesting a writ of habeas corpus, nor is it specified which court should review the petition. Further, petitioner had already served 18 months of his sentence and the ten day period following sentencing in which to file a motion for Modification of Sentence under the Choctaw Criminal Rules of Procedure has long passed. Therefore, this Court granted the request for a hearing on the matter.

2. The trial court's order dated February 1, 2010 does not violate the ICRA.

Petitioner argues that the trial court order dated February 1, 2010[2] violated the ICRA because the total length of sentencing imposed in the order is 30 months imprisonment. Under the petitioner's interpretation of the ICRA, the court unconstitutionally stacked sentences because the ICRA prohibits imprisonment for a term of more than 1 year. However, petitioner does not point to any legal authority to support this interpretation aside from the language of the statute itself. Section 1302(7)[3] reads in pertinent part that "No Indian tribe in exercising powers of self-government shall ... in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year."

Respondent argues that petitioner erroneously invoked the ICRA, specifically §1302(7), in support of his contention that "stacking" or consecutively imposed sentences are unconstitutional. Respondent argues that the order dated February 1, 2010 does not breach the ICRA one year limit on sentencing as the order involved four different cases each with separate and distinct offense dates.

The Court finds no ambiguity in the law regarding a tribal court's ability to impose consecutive sentences for separate criminal occurrences. The court order under question includes sentencing for four separate criminal cases, each with separate dates. A review of the sentencing in each criminal case shows that three of the four cases (CR 2008-191; CR 2008-224; CR 2010-0039) do not exceed sentences of imprisonment beyond one year regardless of the number of offenses involved in each case. If the Court accepted petitioner's argument, the most time any one defendant could be sentenced is one year cumulatively, regardless of the number of separate criminal cases in which a person was involved. The MBCI judicial system would become irrelevant to repeat offenders. Therefore, this Court rejects petitioner's argument that the court erred by stacking sentencing in CR 2008-191, CR 2008-224, and CR 2010-0039 in violation of the ICRA.

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[2] The actual sentencing imposed under the order is thirty-eight (38) months imprisonment with three (3) months suspended.

[3] The Tribal Law and Order Act of 2010 amended the ICRA section 1302(7) by increasing the maximum penalty or punishment for any one offense to a term of 3 years or a fine of $15,000 or both; or a total penalty or punishment greater than 9 years on a person in a criminal proceeding.

The sentencing imposed in case CR2008-91 was 18 months incarceration (three 6 month terms to run consecutively) with 3 months suspended. A review of the offenses in this case show that Clayton was found guilty of three separate tribal code violations which arose from the same incident on January 15, 2008: Aggravated Battery, Class A; Theft, Class A; Criminal Trespass, Class B. In addition, CR2008-91 included sentencing for a violation for Disobedience to Lawful Order of the Court – Failure to Appear at Trial on April 14, 2008, Class B.

Petitioner, during the hearing, further argued that the sentencing under case CR2008-91 violated §1302(7) of the ICRA because all charges were associated with the singular events of January 15, 2008. Petitioner interprets the term "any one offense" under ICRA to cover all criminal violations arising out of the same set of events or transaction.

Respondent disagrees with petitioner's interpretation of "offense" in §1302(7)[4] and argues that "offense" means a separate criminal cause of action. Respondent supports his interpretation with the analysis in *Alvarez v. Tracey,* 2011 WL 1211549 (D.Ariz. March 31, 2011).

In *Alvarez,* the court examined the statutory construction of the provision at issue and the use of the term "offense" in the ICRA. "Offense" is used twice, once at §1302(7) and once at §1302(3) which prohibits "subject[ing] any person for the same offense to be twice put in jeopardy." *Alavarez,* at *2. The court relied upon the double jeopardy clause in the ICRA and in the U.S. Constitution to inform its definition of the term "offense." Prior to the enactment of the ICRA, the US Supreme Court in *Blockburger v. US,* 284 U.S. 299 (1932) held

> [F]or purposes of a federal statute, that where the same act or transaction constitutes a violation of two distinct statutory provision, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Alvaraz, at *2 (citing *Blockburger* at 304).

Based on *Blockburger,* the court determined that the term "offense" as used in §1302(3) had an established meaning -- "it meant a crime with its separate elements of proof, not the underlying criminal event" – prior to enactment of the ICRA. Based on rules of statutory construction that applies the same meaning to similar phrases in neighboring subsections, the court found "no reason to conclude that Congress meant something different when it used "offense" in §1302(7)" than it did when used "offense" in §1302(3). *Alvarez,* at *3. The federal district court concluded "that for purposes of §1302(7), two charges are

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[4] The ICRA did not provide a definition for the term "offense" until the Tribal Law and Order Act of 2010 amended §1302 of the ICRA by providing that "the term 'offense' means a violation of a criminal law." Pub.L. No. 111-211, §234(a)(3), 124 Stat. 2258, 2279-81.

different when it used "offense" in §1302(7)" than it did when used "offense" in §1302(3). *Alvarez,* at *3. The federal district court concluded "that for purposes of §1302(7), two charges are different offenses if each 'require proof of a fact which the other does not,' regardless of whether they arise from the same transaction." Id. At *3.

In addition, a review of tribal law case law shows that the Eastern Band of Cherokee tribal court addressed this same issue in *Eastern Band of Cherokee Indians v. Crowe*, 9 Am. Tribal Law 27 (June 23, 2010). In *Crowe*, defendant filed a Motion for Appropriate Relief with the tribal court pursuant to tribal code asserting that the three 12 month consecutive sentences imposed by the tribal court violated §1302(a)(7) of the ICRA when all criminal charges arose out of the same criminal transaction. The court rejected Crowe's legal arguments that supported the interpretation that the language "any one offense" is ambiguous and could be interpreted to prevent the court from imposing a sentence in excess of one year of incarceration for acts arising out of a "common nucleus of facts" or a single criminal transaction. The court concluded that the court's imposition of consecutive sentences did not violate the ICRA. *Crowe,* at 36.

Without the benefit of any legal arguments to support the petitioner's claims, this Court agrees with the analysis in *Alvarez* and *Crowe* and finds that the ICRA does not prohibit consecutive sentencing or "stacking" of offenses even if the tribal code violations arise out of the same criminal transaction. The petitioner's request for a writ for habeas corpus is denied.

SO ORDERED AND ADJUDGED this the 23rd day of March 2012.

Hilda Nickey, Chief Justice

Brenda T. Pipestem, Associate Justice

Robert Jones, Associate Justice

CHOCTAW SUPREME COURT
COURT
CLERK
CHOCTAW, MS