IN THE SUPREME COURT
OF THE
MISSISSIPPI BAND OF CHOCTAW INDIANS

MISSISSIPPI BAND OF CHOCTAW INDIANS — APPELLANT

VS.

CAUSE NO. SC 2013-03

DONOVAN ALLEN — APPELLEE

Appellant Mississippi Band of Choctaw Indians filed this "direct appeal" in a criminal case wherein the lower trial court judge presiding over a bench trial granted Defendant-Appellee's Motion for a Directed Verdict of Acquittal. The motion came at the conclusion of the prosecution's case in chief on charges of Driving Under the Influence of Intoxicating Liquor, a Class "B" offense pursuant to Sec. 4-5-9, and of Failure to Stop at a Stop Sign, a Class "C" offense pursuant to Sec. 4-4-6 of the Choctaw Tribal Code. A third charge, Driver's License Required, a Class "C" offense pursuant to Sec. 4-5-2, was dismissed by the prosecution upon defendant's production of a copy of his driver's license. The trial court granted defendant's motion and dismissed the case with prejudice. This appeal ensued.

Appellant's argument on appeal is that "[s]ince the evidence presented must be viewed in a light most favorable to the prosecution[,] the trial Court's dismissal with prejudice was clearly erroneous." Furthermore, Appellant argues that the trial court erred in finding, based on the testimony presented at trial, "that the prosecution had not met the burden of proof necessary to establish the charge of driving under the influence in violation of Choctaw Tribal Code Sec. 4-5-9." Finally, Appellant submits "that this case should be remanded for re-trial." A statement of the facts follows.

Addressing initially Appellant's argument that "[s]ince the evidence presented [upon defendant's motion for a directed verdict of acquittal] must be viewed in a light most favorable to the prosecution. A motion for a directed verdict requires the court to view the facts and the law.

Facts of the Case

The lone witness at trial for the prosecution was Choctaw Police Department patrol officer Kelby Anderson, who testified that at approximately 2:11 a.m. on October 30, 2012, while parked, he observed the Defendant fail to stop at a stop sign at the intersection of Tucker cut-off road and West Tucker Circle. Officer Anderson conducted a traffic stop. As he approached, he testified the driver got out of the truck and he ordered the defendant to stay put; furthermore, Officer Anderson said, both the driver and another passenger, "smelled the odor of alcohol." The Officer testified to having discerned the defendant's slurred speech, red eyes, and unsteady walking back and forth. The officer did not have his flashlights, only the security lighting of the adjacent

Daycare Center. Concerned as to lights at a nearby house, Officer Anderson testified that he conducted "zero" field sobriety tests, but summarily arrested and transported the defendant to the Choctaw Police Department. There the defendant refused intoxilyzer testing. At the close of the prosecution's case, Defendant moved for a directed verdict of acquittal which was granted.

Arguments and Analysis

Defendant-Appellee's Motion, taken literally, is that the prosecution "[had] not met their burden of proof * * * * * [in that] he [the officer] did not follow the correct police procedure as laid out by the Choctaw Police Department." Counsel argued that without following the Departmental police procedure, which requires an officer to conduct at least three of the eight enumerated field sobriety tests, the subject of a traffic stop can neither be charged nor convicted for DUI. Appellant counters that "[the procedure, policy is not one and the same as what the Choctaw Code says." In its essence, the parties to this appeal are asking whether the procedures and protocols of the Choctaw Police Department have the force and effect of law. We hold that it does not; however, the scope of the court's determination must be qualified for the reasons that follow.

The Tribe's lower court "Motion to Reconsider Judgment; or in the Alternative, Motion For New Trial," is accompanied by an "Exhibit B' which has a 99-page document titled "Mississippi Band of Choctaw Indians Law Enforcement Services Program." "Exhibit A" to that same motion has only a single page, designated as Page "2.8.2" of the Law Enforcement Services "Police Procedures Manual." Both parties acknowledge that the two publications are separate and it was only the former that was adopted by Tribal Council Resolution CHO 02-141. The full text of the Police Procedures Manual has never been brought before the Court, nor should it ever be since such a sweeping pronouncement would never be undertaken.

As concerns the single Page 2.8.2 as Exhibit A, that single provision alone is facially defective. Under the heading, "*Field Sobriety Tests.*" it reads as follows:

> 1. If officers have probable cause to contact the driver, based on an observable traffic violation, and they appear to be under the influence of alcohol or drugs, they administer a minimum of three field sobriety tests from the following list of the most commonly administered tests:
>
> A. Horizontal gaze nystagmus (only if properly certified)
> B. Walk and turn.
> C. One leg stand
> D. Reciting of alphabet.
> E. 10 count
> F. Nose find.
> G. Coin lift

A literal analysis of the provision's wording shows mention initially that the term "officers" is in the plural so as to encompass multiple officers, whereas the driver is in the singular, indicating thereby only one person. Yet two phrases follow that say: "and *they* appear to be under the influence of alcohol or drugs, *they* administer a minimum of three sobriety tests." [Italics added for emphasis.] The "they" being plural can only mean the word "officers" as the antecedent: a

The passage of no comparable Choctaw Tribal Ordinance has been called to the court's attention and no such APA is believed to have been adopted by the Tribal Council for such matters. The trial court should not have granted Defendant's Motion for a Directed Verdict on the basis of the grounds presented, if in fact it was its sole basis; however, for the reasons that follow the Motion could nonetheless have been granted.

The concluding remark of the trial judge, prior to ruling that the case was dismissed with prejudice, reads in its essence, "The officer did submit that he did not follow the, what is needed for ... to find the individual [guilty] of driving under the influence or intoxication." The Plaintiff-Applellant's brief does correctly cite *Gilpatrick v. State of Mississippi,* 991 So.2d 130 (Miss. 2008) in asserting that, "The defendant's refusal of an Intoxilyzer test required the Tribe to prove its case utilizing evidence regularly used to establish "common law DUI"; however the facts in evidence fail to prove that the defendant was guilty of a common law DUI.

The trial record reflects that there was "zero" sobriety testing; hence, the absence of any field test producing any demonstrable evidence whatsoever. In the total absence of any observed erratic driving taking place, *Leuer v. City of Flowood,* 744 So. 2d 266 (Miss. 1999); the absence of any wreck, *Gilpatrick v. State of Mississippi,* 991 So 2d 130 (Miss. 2008); the absence of mention of any observation of alcohol in the vehicle, *Gilpatrick v. State of Mississippi,* 991 So 2d 130 (Miss. 2008); the absence of any confession of defendant/appellee that he would not pass an Intoxilyzer test, *Knight v. State of Mississippi,* 14 So. 3d 76 (Miss. 2009); indeed, the absence of any confession of having even been drinking, *Deloach v. City of Starkville,* 911 So 2d 1014 (Miss. 2005); in combination with this officer's arrest for DUI after "zero" field testing was effected without the probable cause required by Rule 6(b)(2) of the Choctaw Rules of Criminal Procedure necessary to make the defendant's arrest lawful.

Each and every officer observation was of either limited or of no evidentiary value. Regarding the alcohol odor, Patrolman Anderson testified, "**Both** of them smelled the odor of alcohol." [Emphasis added] Hence, the respective degree of the source smell was indistinguishable between the driver and the passenger, in the absence of anything in the record explaining otherwise, and in any event nothing further as to the circumstances was testified to. The record identified the only light source at 2:00 a.m. as the security lighting of the Daycare Center, and this lends very limited evidentiary weight and worth to the officer's testified observation that, "His eyes was red, had a glossy _____." The patrol officer's comment that the defendant, "...was unstable as he walked back and forth," was not demonstrably substantiated by the Patrolman's administering a field approved "Walk and turn" or a "One leg stand" test -- either or both of which could have been conducted without the officer's benefit of the flashlights he had failed to carry with him. Officer Anderson testified defendant's "speech was slurred." It also lacks field test proof because he also did not have the driver perform the field-approved "Alphabet test" or the "10 count" that his training should have prepared him for. Those, too, could have been conducted without benefit of any flashlight. The same comments apply as to the "Nose find." In reality, his absence of a flashlight only impeded his ability to administer the "Horizontal gaze nystagmus test," and many courts now question the validity of that field test,

purely nonsensical, albeit literal, interpretation of its wording. The Tribal Council clearly would never have adopted it as law, worded as it is.

The only colorable legal authority Defendant-Appellee raises is Choctaw Tribal Code provision 4-5-10 entitled "adoption of Mississippi Traffic Rules and Regulations." That section reads:

> Title 63 of the Mississippi Code Annotated 1972, as now existing or as may be hereafter amended, shall apply as the laws, rules and regulations of the Mississippi Band of Choctaw Indians, but only insofar as they do not conflict with or overlap any law, rule or procedure established in this Choctaw Traffic Code or elsewhere in the Choctaw Tribal Code, or unless the Mississippi Band of Choctaw Indians' Tribal Council shall, by resolution, declare all or some part of such Mississippi laws, rules and regulations inapplicable hereunder.

Appellee argues that the Mississippi Title 63 allows the Commission of Public Safety and the State Crime Lab to promulgate rules and adopt "procedures, rules, and regulations to enforce the state's *Implied Consent Law,* * * * This would suggest that not all procedures, rules, and regulations have to be adopted to be part of Mississippi law." The fallacy with Appellee's argument is that he argues the Choctaw Police Procedures Manual -- and not that of a Mississippi Commission of Public Safety rule -- was violated. Nonetheless, he maintains with no supporting authority, "As the analogous agency of Mississippi's Commission of Public Safety is the Choctaw Police Department, *it is safe to say that Choctaw Police Department can adopt procedures, rules, and regulations to administer and enforce the Adopted Title 63." [italics added]* For the court to pronounce such a broad sweep and investiture of lawmaking authority upon the Choctaw Police Department is a power which, if ever it were to be conferred at all, must be by expressed legislation of the Choctaw Tribal Council. Furthermore, when federal and state legislatures have taken such comparable steps in delegations of rulemaking authority, it has invariably been permitted pursuant to and in conformity with their respective Administrative Procedures Acts. See, e.g., Mississippi Administrative Procedures Act, Sec. 25-43-1 *et seq,* Mississippi Code of 1972, as Amended; and Federal Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, Title 5 United States Code, Sec. 500 *et seq.* (June 11, 1946).

Ultimately, in any event, Choctaw Tribal Code section 1-1-5 entitled "Amendment of the Tribal Code" completely eviscerates any support for Defendant-Appellee's claim. That provision reads:

> §1-1-5 Amendment of Tribal Code
> This Tribal Code may be amended and additions made hereto and deletions made here from in the manner provided for the adoption of Tribal ordinances. Amendments and additions to this Tribal Code shall become a part hereof for all purposes and shall be organized and incorporated herein in a manner consistent with the numbering and organization of the Tribal Code. Approval by the Secretary of the Interior shall not be required for amendments of the Tribal Code except to the extent that such approval may otherwise be required by federal or Tribal law.

and most others require a demonstration of a high degree of training and expertise on the part of the administering officer in advance of its admissibility. Yet other courts require satisfaction of the Frye test standards in advance of their HGNT's results' admissibility. State v. Witte, 836 P.2d 1110, 251 Kan. 313 (Kan., 1992)

While the field testing called for by page 2.8.2 of the Police Procedures Manual is not necessarily law *per se,* its Field Sobriety Test provisions do constitute sound police practices. Their proper administration may well be requisite, absent other extenuating or extraneous circumstances, to the establishment of the probable cause which is the prerequisite to a DUI arrest.

Double Jeopardy

As was initially indicated, this appears to be a direct appeal filed in accordance with the initial language of Choctaw Tribal Code Section 7-1-3, and Appellant Tribe affirmed upon oral argument that reversal for a new trial was indeed being sought. That Code language reads, "Any party who is aggrieved by any final order, commitment or judgment of the Tribal Court may appeal in the manner prescribed by these rules..." That general language, however, is next qualified: it stipulates, "provided that appeals at the request of the prosecution from a criminal case in which the defendant has been acquitted shall be based solely on a question or questions of law, the answer to which shall be given prospective application only, without any effect on the defendant and without requiring the defendant to participate in the appeal in any manner."

The intent and purpose of that qualification language is obvious. Article X of the Tribal Constitution of the Mississippi Band of Choctaw Indians entitled "Rights of Indians" reads in pertinent part:, "Sec. 1. The Mississippi Band of Choctaw Indians, in exercising powers of self-government shall not: * * * (c) Subject any person for the same offense to be twice put in jeopardy." This double jeopardy prohibition, in language identical to the Choctaw Tribal Constitution, is also a central provision of the Indian Civil Rights Act of 1968, 25 U.S.C. Sec. 1301 – 1304, Pub. L. 109 – 136, 119 Stat. 2643, stating:

> "§ 1302. Constitutional Rights: No Indian tribe in exercising powers of self-government shall:
> (a) In general
> No Indian tribe in exercising powers of self-government shall—
> a. Subject any person for the same offense to be twice put in jeopardy.

The Fifth Amendment to the amendments to the United States Constitution declares in pertinent part that "nor shall any person for the same offence be twice put in jeopardy of life and limb," and is generally referred to as the "double jeopardy clause."

In light of each and all of the authorities above, appeal from a directed verdict of acquittal of Defendant/Appellee from the criminal prosecution -- rather that being a "direct appeal" under the initial clause of Tribal Code Section 7-1-3 and the Prosecution requesting that "Based on the foregoing reasons, the appellant respectfully submits that this case should be remanded for a new trial," should have been in what will herein be referred to as a "prosecution appeal." The

wording of the balance of 7-1-3 "provided that appeals at the request of the prosecution from a criminal case in which the defendant has been acquitted shall be based solely on a question or questions of law, the answer to which shall be given prospective application only, without any effect on the defendant and without requiring the defendant to participate in the appeal in any manner," clearly contemplates that to do otherwise would constitute double jeopardy.

Jeopardy normally attaches in a jury trial once a jury has been impaneled and the initial testimony first begins; analogously, where in a bench trial the judge sits as both judge and jury, jeopardy attaches once the first trial testimony begins.

It matters not whether the trial court grants the directed verdict of acquittal for good reason or based on an error of law or an error in interpretation of facts – or some combination of errors of facts and law. The result remains clear; the defendant once acquitted for any of the previously stated reasons, cannot be re-prosecuted without violating double jeopardy prohibitions. And again, the trial judge's expression of her reasons for granting the motion leave room for alternative interpretations. The Choctaw Supreme Court will only consider appeals if the appellant can show that the findings of fact are not supported by "substantial evidence" or if the conclusions of law by the lower court are "clearly erroneous." *Mississippi Band of Choctaw Indians v. Wilburn Williamson,* SC 2001-23 (September 28, 2004).

The United States Supreme Court made the above rules clear in the case *Evans v. Michigan,* 133 S.Ct 1069, 185 L.Ed.2d 124, 81 USLW (2013). In that case, after the State of Michigan rested its case at petitioner Evans' arson trial, the court granted Evans' motion for a directed verdict of acquittal, concluding that the State had failed to prove that the burned building was not a dwelling, a fact the court mistakenly believed was an "element" of the statutory offense. The State Court of Appeals reversed and remanded for retrial. In affirming the Appeals Court's ruling, the State Supreme Court held that a directed verdict based on an error of law that did not resolve a factual element of the charged offense was not an acquittal for double jeopardy purposes. The US Supreme Court granted review and reversed both Michigan appeals courts' rulings. It held: The Double Jeopardy Clause bars retrial for Evans' offense. It cited a myriad of precedential decisions and their holdings. These follow:

> (a) Retrial following a court-decreed acquittal is barred, even if the acquittal is "based upon an egregiously erroneous foundation," *Fong Foo v. United States,* 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629, such as an erroneous decision to exclude evidence, *Sanabria v. United States,* 437 U.S. 54, 68–69, 98 S.Ct. 2170, 57 L.Ed.2d 43; a mistaken understanding of what evidence would suffice to sustain a conviction, *Smith v. Massachusetts,* 543 U.S. 462, 473, 125 S.Ct. 1129, 160 L.Ed.2d 914; or a "misconstruction of the statute" defining the requirements to convict, *Arizona v. Rumsey,* 467 U.S. 203, 211, 104 S.Ct. 2305, 81 L.Ed.2d 164. Most relevant here, an acquittal encompasses any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense. See, *e.g., United States v. Scott,* 437 U.S. 82, 98, 98 S.Ct. 2187, 57 L.Ed.2d 65; *Burks v. United States,* 437 U.S. 1, 10, 98 S.Ct. 2141, 57 L.Ed.2d 1. In contrast to procedural rulings, which lead to dismissals or mistrials on a basis unrelated to factual guilt or innocence, acquittals are substantive rulings that conclude proceedings absolutely, and thus raise significant double jeopardy concerns. *Scott,* 437 U.S., at 91, 98

S.Ct. 2187. Here, the trial court clearly "evaluated the [State's] evidence and determined that it was legally insufficient to sustain a conviction." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572, 97 S.Ct. 1349, 51 L.Ed.2d 642. Evans' acquittal was the product of an erroneous interpretation of governing legal principles, but that error affects only the accuracy of the determination to acquit, not its essential character. See *Scott,* 437 U.S., at 98, 98 S.Ct. 2187. Pp. 1074 – 1076.

The Mississippi rule is that double jeopardy protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. *White v. State,* 702 So.2d 107, 109 (Miss.1997).

In 1974 during that pre-Smith John period when the State of Mississippi persisted in prosecuting Mississippi Choctaws for reservation crimes in clear violation of the federal Major Crimes Act, Title 18 U.S.C. A. Sec. 1153, a tribal member was indicted, prosecuted, and convicted on homicide charges by culpable negligence following the deaths of three non-Indian women in a 1971 automobile accident on a strip of Hwy. 16 passing through reservation lands of the Pearl River Community. At the close of the State's case in chief, Defense counsel made its Motion for a Directed Verdict of Acquittal, arguing that the prosecution failed to prove a material element of the crime charged. That was denied by the trial court and defendant was convicted by the jury. An appeal to the Mississippi Supreme Court followed.

In a case captioned *State of Mississippi v. Frazier,* 289 So2d 690 (1974), the Mississippi Supreme Court reversed the trial court and concluded from the record that the Motion for a Directed Verdict should have been granted. In doing so, it stated:

> There is no proof that defendant's drinking resulted in an abnormal mental or physical condition that tended to deprive her of the clearness of intellect and self-control which she would otherwise have possessed. In other words there is a total lack of proof that her drinking was a proximate cause of the death of Mrs. McMillan. As said in Gant v. State, 244 So.2d 18 (Miss.1971), the testimony only creates a suspicion that defendant was intoxicated, and this is not sufficient to warrant a conviction of manslaughter.

Even though the Neshoba County Circuit Court, the US Supreme Court would later hold in United States v. John John v. Mississippi, 437 U.S. 634, 98 S.Ct. 2541, 57 L.Ed.2d 489 (1978) wrongly exercised jurisdiction, the point germane to this instant case is that the Mississippi Supreme Court "reversed and rendered" – that is, pronounced Defendant Frazier "not guilty" because the trial court made an error based on its interpretation of the record's facts and the trial court's erroneous understanding of the law. Defendant Frazier's re-prosecution was therefore barred by double jeopardy.

It would seem a cruel irony indeed, after the Tribe's long and difficult struggle to reclaim lawfully-recognized tribal sovereign status over its lands and its inherent power to criminally prosecute both tribal and non-tribal Indians, if that very instrument of governance – and its court systems – were to no longer honor so fundamental a protection against abuse as the double

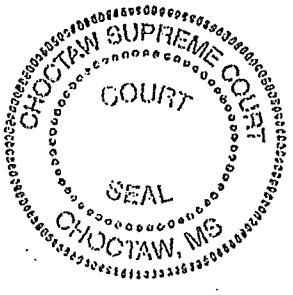
jeopardy protections that are so clearly protected by both federal and tribal constitutions as well as federal and tribal statutes attendant to that most basic of rights.

Conclusion

For the above and foregoing reasons, analyses, and authorities, it is determined that to whatever extent the granting of the verdict might have been based on a regard of the Police Procedures Manual as determinative law, it was in error; to whatever extent it was granted on a determination the prosecution failed to submit sufficient evidence of common law DUI when viewed in the light most favorable to the prosecution, the ruling of the trial judge is sustained; to the extent this matter was cast as what is here termed a "direct appeal" rather than a "prosecution appeal," it is improperly grounded; and Plaintiff-Appellant's request for remand for a retrial of defendant be, and hereby is denied.

SO ORDERED THIS THE 17th DAY OF APRIL, 2014.

ASSOCIATE JUSTICE



CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 17th day of April , 2014 caused to be forwarded by the United States Mail, a true and correct copy of the above and foregoing document to the below listed counsel of record.

Hon. Kevin J. Payne
Special Prosecutor
Mississippi Band of Choctaw Indians
Office of the Attorney General
Post Office Box 6258
Choctaw, MS 39350

Hon. Kevin Brady
Choctaw Legal Defense
Post Office Box 6255
Choctaw, Mississippi 39350

Hon. Ashley Lewis
Choctaw Legal Defense
Post Office Box 6255
Choctaw, Mississippi 39350

Hon. Donald L. Kilgore
Attorney General of The
Mississippi Band of Choctaw Indians
P.O. Box 6258
Choctaw, MS 39350

Hon. Peggy Gibson
Sr. Criminal Court Judge
Choctaw Tribal Criminal Court
Choctaw, MS

CHOCTAW SUPREME COURT
CHOCTAW, MS

Jane Charles, Clerk of Court