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CHOCTAW TRIBAL SUPREME COURT OF THE MISSISSIPPI BAND OF CHOCTAW INDIANS

DAVITA MCCLELLAND — **APPELLANT**

V. — **CAUSE NO. SC2017-04**

MISSISSIPPI BAND OF CHOCTAW INDIANS — **APPELLEE**

ANGELA DIANNE BELL — **APPELLANT**

V. — **CAUSE NO. SC-2017-10**

MISSISSIPPI BAND OF CHOCTAW INDIANS — **APPELLEE**

INTRODUCTION

Both above-titled appeals consolidated for purposes of this opinion due to the common question of law of whether what is termed "common law DUI" remains a crime prosecutable in tribal court. In January of 2002, the Tribal Council had adopted by Tribal Ordinance 16-NNN a replacement version of the Title IV Traffic Offenses portion of the Tribal Code. This new traffic code no longer included the prior code's language specifically naming in its text "common law DUI" among unlawful traffic offenses relating to impaired drivers on the Choctaw Reservation.

Further complicating the question before the Court is that the present-day Choctaw Tribal Code ("CTC") internet posting of the Title IV DUI statute additionally omits the key wording "who is under the influence of intoxicating liquor" from its statutory text criminalizing other forms of first-time DUI driving offenses, but that is otherwise included in the enacted Tribal Council Ordinance 16-NNN as governing law. Also brought into question through this appeal is whether common law DUI remains a tribal traffic offense by virtue of the state common law DUI statute being adopted through incorporation into tribal law. If so incorporated, the next issue is whether it should be deemed punishable only as a Class C crime as required by the second paragraph of the Tribal Code section incorporating state law.

The final issue before the Court is whether upon a finding of common law DUI under the CTC either -- or both -- of the above appellants in their respective prosecutions and convictions were duly afforded their due process rights and protections which are guaranteed them under the Indian Civil Rights Act of 1968, which at 25 U.S.C. § 1302(a)(6) secures their right to be informed of the nature and cause of the accusation against them; and at § 1302(a)(8) protects them against deprivation of liberty without due process of law; and by those identical rights under Article X, §§ (f) & (h) of the Choctaw Tribal Constitution; as well as through Title II of the Choctaw Rules of Criminal Procedure's Rule 3(b) right to know the nature and cause of the charges against them.

STATUTORY HISTORY

There are presently two statutes in the Choctaw Tribal Code that arguably make common law DUI a separately prosecutable offense. The first is CTC § 4-5-9, which section encompasses comprehensive tribal traffic code provisions addressing a broad range of circumstances and conditions relating to different types of impaired driving and classes of impaired drivers: "Driving while under the influence of intoxicating liquor, drugs or controlled substances, or other substances impairing ability to operate vehicle or with blood alcohol concentrations above specified levels…." The second statute is CTC § 4-5-10, which is sometimes referred to as the "state traffic law assimilation statute." CTC § 4-5-10 is something of a catch-all proviso that adopts or incorporates into the tribal traffic code any other Mississippi state traffic laws, rules, and regulations that are otherwise omitted from Title IV of the Tribal Traffic Code, but "only insofar as they do not conflict with or overlap any law, rule or procedure established in this Choctaw Traffic Code…." As common law DUI no longer is expressly proscribed and not expressly prohibited by the language of CTC § 4-5-9, then the second arguable way it may remain a prosecutable tribal offense could be through the CTC § 4-5-10 statutory provision assimilating as tribal law the state's common law DUI statutory provision -- MS Code § 63-11-30(1)(a).

Two forms of DUI/DWI statutory violations and prosecutions: Virtually all jurisdictions, state and tribal, have specific statutes, adopt state statutes, or follow regulations under 25 CFR Ch. I, Part 11 -- Courts of Indian Offenses and Law and Order Code, which criminalize driving under the influence of alcohol as two distinct forms of violations. The first form is referred to as a common law DUI, which may be evidentiarily proven by field sobriety testing and other indicia of alcohol impairment as described in the paragraph immediately below. The second statutory type of DUI is referred to as a "*per se* DUI." These *per se* DUI laws provide that any driver with a blood-alcohol concentration (BAC) at or above, most frequently .08 percent, are

deemed by law to be intoxicated, and in such circumstances no further evidence of intoxication or impairment need be demonstrated to prove a DUI case.[1]

<u>Common law DUI</u>: After motor vehicles were first introduced into society early in the first half of the Twentieth Century, statutes criminalizing common law DUI initially provided the only means whereby alcohol-impaired drivers could be prosecuted and punished. Courts and juries necessarily had to rely principally on evidence that was oftentimes largely subjective in nature in order to adjudge a person's guilt or innocence. Consequently, there was frequently a great deal of unpredictability and inconsistency underlying these verdicts. Most often the prosecution evidence relied upon to prove that a driver was alcohol impaired was that of the arresting officer's testimony relating to field sobriety testing methods performed, subjective observations, and other determinations. In this tribal jurisdiction, the recommended range of possible field sobriety testing is outlined in the Police Procedures Manual and a minimum of three of seven tests must be performed by the arresting officer in the field to support a finding of common law DUI. It is a fundamental axiom of tribal case law that an officer's testimony as to that field officer's cursory field observations, perceptions, and <u>subjective conclusion</u> of driver's intoxication are not of sufficient evidentiary value, standing alone, to support a conviction.[2] As this Court wrote in *Mississippi Band of Choctaw Indians v. Donovan Allen*, Cause No. SC 2013-03, p. 4 (April 17, 2014):

> 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), *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.

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[1] The Choctaw Tribal Code's *per se* law, CTC § 4-5-9, sets the proscribed blood alcohol concentration (BAC) level at .10 percent for adult non-commercial drivers. Lower BAC percentages (.02 per cent for minors and .04 per cent for operators of commercial vehicles) have been set for these other categories of drivers. This proscribed .10 BAC level was lowered to .08 percent effective August 1, 2019.

[2] The oft-recited banal courtroom testimony is generally to the effect that the subject's eyes appeared to be red, his/her speech was slurred, he/she had the odor of alcohol about his/her person, and the individual was unsteady on his/her feet; therefore, officers testify the subject was determined or concluded to be drunk/intoxicated.

***Per se* DUI**: The second statutory type of DUI is referred to as a *per se* DUI. *Per se* DUI traffic laws provide that any driver with a BAC at or above levels most frequently of .08 percent or above (.10 percent in this tribal jurisdiction at the time of the charged offense) are deemed to be intoxicated as a matter of law. In such circumstances no further evidence of intoxication or impairment need be demonstrated to prove a *prima facie* case of DUI. The most commonplace method of administering BAC testing is through the use of an intoxilyzer or breathalyzer machine. Such testing must necessarily be done by properly trained and certified law enforcement officers on properly calibrated equipment. *Per se* DUI laws are intended, and were enacted, in all such jurisdictions as a means of gaining drunk driving convictions by empirical scientific testing, rather than by reliance upon the more traditional subjective determinations made through law enforcement officers administering a minimum of three of the seven field sobriety tests of the Police Procedures Manual in this jurisdiction.

Ultimately, both statutory approaches criminalizing the operation of a motor vehicle while in a state or condition of alcohol intoxication or impairment are closely intertwined with the ultimate goal of protecting the public. Additionally, criminalization of common law DUI has historically preceded legislative enactments of *per se* DUI statutes. Many jurisdictions seemingly treat *per se* statutes more as something of an evidentiary change, rather than of a substantive extension or add-on to the basic common law offense. The basic elements of both violations are to establish whether a driver's condition and degree of alcohol impairment rises to the extent of jeopardizing the individual's ability to safely operate a motor vehicle.[3]

The chief problem triggering the two appeals before this Court, however, is that the January 8, 2002 enactment of Tribal Ordinance 16-NNN omits the language of all earlier tribal DUI statutes that expressly criminalized common law DUI from the textual body of CTC § 4-5-9. Additionally, the public internet posting of the Choctaw Tribal Code Title IV DUI as of the date of this hearing leaves out the key wording enacted in Tribal Ordinance 16-NNN that states "who is under the influence of intoxicating liquor" from its statutory text criminalizing other "*per se*" forms of first-time DUI driving offenses. This administrative error of omission in the on-line

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[3] Because of the close commonality of the two DUI forms, prosecutors have the discretion to change mid-trial from attempting to establish "*per se* DUI" to proving the common law offense when, as trial progresses, prosecutions fail to establish the requisite foundation to be able to introduce into evidence test results of a driver's BAC test levels on a "*per se* DUI" charge; or, where once introduced into evidence, effective defense cross-examination of pre- and post-testing protocols utilized to secure those test results cast reasonable doubt upon the accuracy or adequacy of testing results. Tribal prosecutors may then modify strategies and proceed to introduce evidence establishing a driver failed field sobriety tests as well as other testimony tending to prove beyond a reasonable doubt "common law DUI" impairment of the accused. Most prosecutors will charge a complaint in the alternative and submit jury instructions whereby the bench or jury may determine guilt by one, or, if not, it then by the other charge. By that means, if a conviction cannot be secured due to failed or deficient BAC testing, a court or jury may nonetheless find that the prosecution has proven guilt beyond a reasonable doubt on evidence establishing the requisite elements of a "common law" DUI charge.

version of the Choctaw Code has been further misleading to the public and to tribal court practitioners. Both omissions of key wording necessitate this Court's ruling on the question of whether the Tribal Traffic Code criminalizes common law DUI and, if so, upon what basis. An overview of DUI traffic laws concerning first offenses, as both presently and as previously written, is first required.

Pre-January 8, 2002 Tribal Code DUI statute: Prior to that January 8, 2002 adoption of what shall be here termed the "New Title IV Tribal Traffic Code," CTC § 4-5-9's heading read, "Driving Under the Influence of Intoxicating Liquor" and it was worded as follows:

> **§ 4-5-9. Driving Under the Influence of Intoxicating Liquor**
>
> (1) ***It is unlawful for any person to drive or otherwise operate a vehicle within this jurisdiction while under the influence of intoxicating liquor.***
>
> (2) If, by chemical tests, chemical analysis of the person's breath, blood or urine, there is indicated a presence of .10 per cent or more (.02 per cent or more for minors) by weight of alcohol in the person's blood, such fact shall give rise to a presumption that the person was under the influence of intoxicating liquor for purposes of this section.
>
> (3) ***Nothing in subsection (2) of this section shall be construed as limiting the introduction of any other competent evidence bearing upon the question whether or not the person was under the influence of intoxicating liquor.***
>
> (4) Driving under the influence of intoxicating liquor is a Class B offense and in addition to other penalties which may be imposed for such offenses, a conviction hereunder shall result in the suspension of driving privileges within this jurisdiction for a period of one year.

(Italics and emphasis added.)[4]

This earlier enacted Section 4-5-9's subsection (1) criminalized the offense of common law DUI. Its wording (italics and emphasis added) was simple and straightforward: "It is unlawful for any person to drive or otherwise operate a vehicle within this jurisdiction while under the influence of intoxicating liquor." Subsection (2) was the Tribal Code's earliest version of the *per se* DUI

[4] Italicizing and underlining indicate wording applying to common law DUI.

proviso.[5] The subsection (3), also italicized and emphasized, makes clear that during a CTC § 4-5-9(2) *per se* DUI prosecution, evidence other that BAC results can be introduced, if need be, to prove a CTC § 4-5-9(1) common law DUI charge in lieu of an originally filed *per se* allegation. Subsection (4) classified both forms of DUI at the same level of severity – as Class B offenses.

New Title IV Tribal Traffic Code Enacted January 8, 2002: On January 8, 2002, the Tribal Council enacted Tribal Ordinance 16-NNN entitled "AN ORDINANCE TO AMEND THE CHOCTAW TRIBAL CODE BY REPLACING TITLE IV, TRAFFIC OFFENSES." This new traffic code changed portions of the text of CTC § 4-5-9 on Driving Under the Influence of Alcohol. Significantly, the new version left out that prior language of CTC § 4-5-9(1) criminalizing the common law form of driving under the influence of intoxicating liquor. Instead, the relevant wording of the new subsection one (1) of § 4-5-9 appears directed to only the several classes of *per se* DUIs.[6] The replacement CTC § 4-5-9(1) enacted January 8, 2002, as codified in the hard-copy version of the new Title IV traffic code, now reads:

> **§ 4-5-9 Driving Under the Influence of Intoxicating Liquor, Drugs, or Controlled Substances, or Other Substances Impairing Ability to Operate Vehicle or with Blood Alcohol Concentrations Above Specified Levels; Penalties Generally; Granting of Hardship Driving Privileges**
>
> (1) It is unlawful for any person who is under the influence of intoxicating liquor to drive or otherwise operate any vehicle within the Choctaw Reservation when that person has an alcohol concentration of ten one-hundredths percent (.10%) or more for persons who are above the legal age to purchase alcoholic beverages under state law or two one-hundredths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law, in the person's blood based upon grams of alcohol per one hundred (100) milliliters of blood or grams of alcohol per two hundred and ten (210) liter [*sic*] of breath as shown

[5] The parenthetical insertion (.02 per cent or more for minors) had a footnote numbered 29 which read: "Amended by Ordinance No. 16-PP, 07/23/96."

[6] As for the balance of CTC § 4-5-9's provisions; subsection (2) relates to drivers under the influence of drugs or controlled substances; subsection (3) to proscribed blood alcohol concentrations of commercial vehicle drivers; subsection (4) to first-time offender penalties, alternative participatory programs, and driving suspension provisions; and subsection (5) having penalty provisions for second or subsequent convictions. In combination, the Tribe's current DUI statute seemingly fails on its face to expressly criminalize actions historically constituting driving under the influence of intoxicating alcohol, unless provable through lawfully administered breath, blood, or urine testing.

by a chemical analysis of such person's breath, blood or urine administered;

In other words, the simple, straightforward language of the pre-existing CTC § 4-5-9(1) common law provision stating that "[i]t is unlawful for any person to drive or otherwise operate a vehicle within this jurisdiction while under the influence of intoxicating liquor" has been fused with the *per se* DUI as written provisos ever since the January 8, 2002 adoption of the actual enacted hard-copy of the New Title IV Traffic Code.

<u>The Tribe's Website Version of the "New Title IV Traffic Code" enacted January 8, 2002</u>: Further complicating the questions facing the Court is that the CTC Title IV Traffic Code DUI section currently available on the Tribe's website omits from its text the key wording "who is under the influence of intoxicating liquor" that criminalizes other forms of first-time DUI driving offenses, even though it is wording the Tribal Council enacted according to the official printed version of the New Title IV Traffic Code that was attached to Tribal Ordinance No. 16-NNN adopted January 23, 2002. Consequently, CTC § 4-5-9(1) as posted on the Tribe's website reads: "It is unlawful for any person to drive or otherwise operate any vehicle within the Choctaw Reservation when that person has an alcohol concentration of ten one-hundreths [sic] percent (.10%) or more for persons who are above the legal age to purchase alcoholic beverages under state law or ...." The legal implications of this language change are profound and disturbing for it appears the general public is not being accurately informed on the official wording of a law governing its citizenry.

On the other hand, both distinctions in practice have been subtle. Tribal traffic prosecutions and convictions for common law driving under the influence of intoxicating liquor have continued to take place based on evidentiary proof other than excessive BACs. Sentencings, too, for first-time common law DUI offenders have been imposed on the same Class B classification and basis as have those earlier provided for on *per se* DUIs. For more than 16 years this practice has remained unchallenged by defense attorneys up until this recent spate of cases have come before this Court on appeal. We do not believe this ongoing inconsistency between the wordings of either the original hard copy of the enacted code replacement or the electronic website versions and the ongoing enforcement of common law DUI by offenders are either pure happenstance or without good cause.

<u>Appellants' Arguments:</u> Appellants assert that the Tribal Council intentionally repealed the common law DUI provision of CTC § 4-5-9 because they wanted future DUI prosecutions to be grounded only on evidentiary proof of excessive BAC levels as determined by scientific testing techniques. Appellants argue that because there is now no explicit common law driving under the influence of alcohol criminal statute as black-letter law within the present-day Tribal Traffic Code CTC § 4-5-9(1) wording, there can be no such prosecutable tribal crime. Appellants claim prosecutions for alcohol common

law DUIs cannot be brought on unwritten law. Without a criminal statute, they contend, accused are not given fair notice that any given action or activity constitutes a criminal offense. Furthermore, absent such a criminal statute, Appellants argue that prosecutors are not statutorily empowered to charge or gain convictions, and tribal courts have no imposable sentence they are statutorily able to mete out. Appellants ultimately assert that charging prosecutions and imposing sentences on the basis of unwritten criminal offenses is to deprive them of their rights to substantive and procedural due process of the law. They say that only CTC § 4-5-9 with proven excessive blood alcohol levels are now subject to criminal prosecution -- and then only on a *per se* DUI charge.

Appellee's Argument: Tribal prosecutors disagree, noting that there is a second Choctaw Traffic Code statute that alternatively makes alcohol common law DUI a separately prosecutable offense. That code provision is CTC § 4-5-10, which is the so-called "state traffic law assimilation statute." It serves as a catch-all provision that adopts or includes as part of Tribal traffic law any other Mississippi state traffic laws, rules, and regulations not already included in our Title IV Traffic Code. The act of adopting laws, codes or other documents by reference into the Tribal Code is expressly recognized and authorized in Title I, Chapter 5 headed "general provisions," and more specifically CTC § 1-5-3 titled "Adoption by Reference Not a Waiver of Sovereign Power of Choctaw Tribe." Its text says: "[T]he adoption of any law, code or other document by reference into the Tribal Code shall in no way constitute a waiver or cession of any sovereign power of the Tribe to the jurisdiction whose law or code is adopted, or in any way diminish such sovereign power, but shall result in the law or code thus adopted becoming the law of the Tribe."[7]

This CTC § 4-5-10 statute immediately follows the CTC § 4-5-9 DUI statute. Significantly, too, this CTC § 4-5-10 so-called "state traffic law assimilation statute" has been on the books since before, and continuously ever since, the January 8, 2002 adoption of TRIBAL ORDINANCE 16-NNN's New Traffic Code.[8] Its main first paragraph provision reads as follows:

§4-5-10 Adoption of Mississippi Traffic Rules and Regulations

[7] The practice of adopting or assimilating legislation of other jurisdictions is not unique to this tribal government. The federal government, for instance, does the same comparable thing through its Assimilated Crimes Act, 18 USC § 13, that makes state law applicable to conduct occurring on lands reserved or acquired by the Federal government as provided in 18 USC § 7, when the act or omission is not already made punishable by an enactment of Congress.

[8] This Court requested supplemental briefs following oral arguments in SC2017-04. Appellee Tribe's Supplemental Brief, at page 5, stated, "in 2002, the language contained in Section 4-5-9 was amended to declare the 'common-law dui' language, and Section 4-5-10 was amended to read as follows: ...." This statement was incorrect in that, as stated above, the language of section 4-5-10 was as early as the January 8, 1980 included in the original tribal code and has remained in its unamended form ever since.

> 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, specifically declare all or some part of such Mississippi laws, rules and regulations inapplicable hereunder.

The State of Mississippi's statute criminalizing common law DUI on alcohol is MS Code § 63-11-30(1)(a) (2015). It provides *in pari materia* that "(1) It is unlawful for a person to drive or otherwise operate a vehicle within this state if the person: (a) Is under the influence of intoxicating liquor…." Appellee's position is that, if for no other basis, the MCA § 63-11-30(1)(a) common law DUI section would become, by operation of CTC § 4-5-10, automatically included, that is, assimilated tribal common law DUI as a part of and into the Choctaw Tribal Traffic laws as well. The Tribe contends under those circumstances that this first paragraph of §4-5-10 would in part offer a remedy for the omission of that earlier CTC § 4-5-9(1) common law DUI language that had been a part of all Tribal Traffic Code versions before January 8, 2002, but had no longer been included thereafter.

The difficulty posed for Appellee's position, however, is that the CTC § 4-5-10's second paragraph, goes on to provide that "[i]t shall be a Class C offense for any person to do any act forbidden to be done under such laws, rules or regulations, or to fail to do any act required to be done under such laws, rules and regulations." Despite this, Appellee Tribe charges in their complaint a general violation of CTC § 4-5-9 with all of its various enumerated forms should all be classified as Class B first offenses including that CTC § 4-5-10-assimilated state common law DUI statutory subsection. They fail to provide a satisfactory, or any, explanation or justification for the disingenuity of utilizing the first paragraph of CTC § 4-5-10, yet ignoring the second paragraph's applicability.

Appellants' Arguments in Rebuttal: Appellants' maintain that the prosecution cannot have it both ways. If CTC § 4-5-10 is to be used as the mechanism whereby the state's MS Code § 63-11-30(1)(a) common law DUI provision becomes criminalized as an assimilated part of the Tribal Code, that form of DUI necessarily must be classified as a Class C, rather than a Class B offense. This filing, prosecution, and sentencing on common law DUIs other than as Class C misdemeanors is yet another instance, Appellants contend, whereby they claim they have been deprived of their rights to substantive and procedural due process. What's more, Appellants' claim, when accused are prosecuted under the MS Code § 63-11-30(1)(a) common law DUI subsection by utilizing CTC § 4-5-10 as a conduit, that Tribal complaints should so allege: a practice not done before these challenges. In short, they claim, tribal prosecutors provide

insufficient, improper, misleading, and/or mixed messages of notification of the nature and cause of the accusation against them when prosecuting accused for common law DUIs.

Appellants in both cases and the Appellee Tribe fail in their respective attempts to rationally decipher and explain the state of the tribal common law DUI offense by means of addressing the two statutes CTC §§ 4-5-9 and 4-5-10 in combination. All parties present irreconcilable code interpretations in these appeals such as to present an impasse through their respective approaches. Appellee Tribe inexplicably claims common law DUI constitutes a prosecutable offense on the reservation by virtue of its CTC § 4-5-10 "assimilation" of the state MCA § 63-11-30(1)(a) language into tribal law while still assigning CTC § 4-5-9 Class B offense level status. Appellee thereby totally disregards CTC § 4-5-10's second paragraph requiring its designation as a Class C infraction. Accordingly, their proffered explanation fails. Appellants first claim that the Tribal Council intentionally omitted the old common law DUI provision because they intended to repeal common law DUI as a traffic offense because of the Council's expectation that all future DUI prosecutions be based solely on blood alcohol level testing. Their reading of the law would lead to consequences either absurd or ambiguous. Also, their alternative argument that an assimilation of state common law DUI by virtue of CTC § 4-5-10, but only as a class C offense, in like manner fails both on equal protection grounds and public policy consequences. A Class C designation of tribal common law DUI through their proposed approach would incentivize refusals of breathalizer testing, for no matter how drunk they might be, by refusing BAC breath testing they would avoid conviction as a Class B *per se* DUI offence and instead face a Class C common law DUI conviction and penalty despite the identical condition of intoxication.

Accordingly, the Court rejects both Appellants' suggested notion of intentional repeal of the common law DUI as a tribal traffic offense and also finds the assimilated state common law DUI prosecutable only as a Class C infraction theory to be an unworkable resolution in light of CTC § 4-5-10's second paragraph requirement.

Plain and simple, it is impossible to read CTC §§ 4-5-9 and 4-5-10 in combination to come up with any acceptable rationale suggested by either Appellants or Appellee. Instead the consensus of this Court on the basis of the analysis set forth hereafter is that the omission of the common law DUI language in the transition from the old CTC § 4-5-9(1) version to the New Title IV Traffic Code's present form was an inadvertent *Scrivner's error*. We find that the intent of the Tribal Council in passing the current CTC § 4-5-9 as enacted January 8, 2002 by Tribal Ordinance 16-NNN is meant to read in such a way as to criminalize tribal common law DUI as a separate Class B offense to the *per se* DUI offenses that are based on the variously proscribed BAC levels.

ANALYSIS AND CONCLUSION

Tribal Code Principles of Statutory Construction: The Tribal Council has expressly empowered this Court to *sua sponte* revisit CTC § 4-5-9(1)'s literal text and to ascribe instead a corrected wording and interpretation in light of its true, intended legislative purpose by their enactment of Tribal Code Title I's General Provisions. Headed "Principles of Construction," **CTC §1-5-7** provides that **"[t]he following principles of construction will apply to all of the Tribal Code unless a different construction is obviously intended:"** first, **CTC §1-5-7(4)** charges that **"[t]his Tribal Code shall be construed as a whole to give effect to all its parts in a logical, consistent manner,"** and **CTC §1-5-7(6)** mandates that ***"[a]ny typographical errors or omissions shall be ignored whenever the intended meaning of the provision containing the error or omission is otherwise reasonably certain to the court."*** Finally, **CTC §1-5-7(7)** directs that **"[a]ny other issues of construction shall be handled in accordance with generally accepted principles of statutory construction giving due regard for the underlying principles and purposes of the Tribal Code."** By all of these we are therefore statutorily instructed to critically examine these texts and whenever it is absolutely necessary and appropriate to invoke the scrivener's error doctrine and to correct its wording.

Judicial revision of flawed statutory language has the potential to wrongly encroach into a role otherwise entrusted exclusively to the Legislative Branch. However, as noted, the Tribal Council through these three code provisions calls upon us to mediate this role in precisely those special circumstances as are those presented here. Moreover, the many and clear indicia that the text of CTC § 4-5-9(1) of the New Traffic Code is meant to include wording encompassing criminalization of common law DUI is overwhelmingly demonstrated by multiple sources.

Title & Index: First, we see expression of Tribal Council's statutory intent to retain ongoing criminalization of alcohol common law DUI as part of the January 8, 2002 enacted CTC § 4-5-9 by the newly adopted heading, or title:

> **Driving Under the Influence of Intoxicating Liquor, Drugs, or Controlled Substances, or Other Substances Impairing Ability to Operate Vehicle or With a Blood-Alcohol Concentrations Above Specified Levels; Penalties Generally, Granting of Hardship Driving Privileges.**

The pre-January 8, 2002 Tribal Code DUI statute had been titled simply, "Driving Under the Influence of Intoxicating Liquor." The title to the current CTC § 4-5-9 statute now names Driving Under the Influence of Intoxicating Liquor as the very first subject of the statute's text. *Per se* DUI, on the other hand, is named separately much further down in the title's listing of the various DUI offenses of the text. Certainly, had the intent of the Council been to delete the

common law DUI prohibition from the text portion of § 4-5-9, they would not have specifically listed it as a provision (much less the first) in the new text heading or title.

Reinforcing this same point, the index page to Title IV, Chapter 5 MISCELLANEOUS DRIVING PROVISIONS CTC § 4-5-9 partially designates its subject(s): notably the subject content is for CTC § 4-5-9 "Driving Under the Influence of Intoxicating Liquor, Drugs, or Controlled." Appellants had argued, that only CTC § 4-5-9 proven excessive blood alcohol levels are now subject to criminal prosecution -- and then only on a *per se* DUI charge. If that had in fact been the Tribal Council's intent, then the title wording that they would have used should have begun "Driving with a Blood-Alcohol Concentration Above Specified Levels." It did not. Another point of note relating to the Title IV index's very placement first of common law DUI in its subject heading is that it would be consistent with the previous version of § 4-5-9's placement in the earlier text content. Significantly, too, the CTC § 4-5-9 title/heading above the textual body at pages 18-19 of CTC Title IV Traffic Offenses names the common law DUI as the very first identified traffic offense and the blood-alcohol concentrations portion as the last listed category of substance, an indication of the separateness of common law DUI and *per se* DUI offenses. Significant, too, the comma preceding the word "or" before the mention of blood-alcohol concentrations grammatically separates the *per se* DUI designated traffic offense from that first listed common law DUI violation. This is another indicator that both were to be in the text separately. The "or" also is used grammatically as a disjunctive article. It indicates common law DUI and *per se* DUI are separate charging and prosecuting approaches.

There are therefore from the black-letter text of the Index and from the black-letter Title to CTC § 4-5-9 two very compelling indicators tending to make it clear that Tribal Council's intention was that the language of CTC § 4-5-9's text portion was meant to be worded in such a way as to also criminalize common law DUI as a Class B offense in its New Traffic Code. There are as well the several additional observations on placement supporting our analysis. We next look to the legislative history.

Legislative History: Legislative history and legislative intent are inextricably intertwined in relation to the proper interpretation and purposive reading of the Choctaw Code's set of § 4-5-9 Driving Under the Influence laws' provisions. In July of 1996, Tribal Ordinance 16-PP had been enacted for the expressed purpose of strengthening reservation alcohol and liquor laws. It also did it on an expedited basis, rather than awaiting adoption of the New Traffic Code. The ordinance's preamble recited in material part that the Tribe "is currently carrying out a project under grant from the Bureau of Indian Affairs to comprehensively amend the Choctaw Tribal Code" and "there are, however, sections of the current Code which, because of pressing situations that have arisen in the area of law enforcement, require addressing, and thus the Code

needs amendment prior to the enactment of the fully amended Code...." This earlier adoption of strengthened alcohol and liquor laws to meet "pressing situations" was an obvious reference to meeting basic qualifying requirements for Section 408 grant program funding that Congress developed beginning in 1982. To qualify for a grant under the Title 23 USC § 408 program, states and tribes were required to meet four criteria, including the enactment of a .10% BAC *per se* law. Consequently, the Tribal Council's 1996 amendment lowered the proscribed BAC from its prior .15% *per se* level down to .10% *per se* in order to meet one of those four criteria.[9] Also, the 1996 Tribal Ordinance 16-PP amendments provided for mandatory suspension of driving privileges for a period of one year, again to meet the 23 USC § 402(e)(1)(A) mandatory sentencing requirement "for the prompt suspension, for a period not less than ninety days in the case of a first offender...." [10]

Passage of Ordinance 16-NNN replacing Title IV Traffic Offenses by that New Traffic Code with its new CTC § 4-5-9 only furthered that process by adopting one of those four criteria of the § 402 Alcohol traffic safety programs. By thus reinforcing that the intent of CTC § 4-5-9 Driving Under the Influence laws' provisions were cued into National Highway Safety Administration alcohol safety program incentive grant funding, it would be disingenuous to undo a key part of our alcohol safety programs by eliminating a provision criminalizing common law DUI through the New Tribal Code version. Once again, this shows that Appellant McClelland's

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[9] Tribal Ordinance 16-PP relevant wording reads:

A RESOLUTION TO AMEND THE TRIBAL CODE

> WHEREAS, the Mississippi band of Choctaw Indians is currently carrying out a project under Grant from the Bureau of Indian Affairs to comprehensively amend the Choctaw tribal code, and
> WHEREAS, there are, however, sections of the current code which, the cause of pressing situations that have arisen in the area of law enforcement, require addressing, and thus the code needs amendment prior to the enactment of the fully amended code, and
> WHEREAS, this ordinance has been reviewed and approved by the committee on judicial affairs and law enforcement of the tribal Council, now therefore be it
> ENACTED, that the tribal Council does hereby amend the tribal code as follows:
>
> * * *
>
> Strike §4-5-10 ("driving while intoxicated") in its entirety; renumber §§4-5-11 and 4-5-12 as §§4-5-10 and 4-5-11; strike, in §4-5-9 ("driving under the influence of intoxicating liquor"), subsection (2) "but less than .15 per cent" and insert in lieu thereof "(.02 per cent or more for minors)"; and strike, in §4-5-9(4) "and shall pay a lesser included offense to the offense of driving while intoxicated." and insert in lieu thereof "and in addition to other penalties which may be imposed for such offense, a conviction hereunder".

[10] The one-year mandatory suspension period was scaled back to a "period of not less that ninety (90) days and until such person attends and successfully completes an alcohol safety education program" in the Ordinance 16-NNN New Traffic Code CTC § 4-5-9(4). This change still conformed to the bounds of the 23 USC § 408(e)(1)(a) law which went into effect January 2, 2001 – yet another indication of the ongoing Tribal Council's legislative intent to become or remain compliant with Section 408 Alcohol traffic safety program's basic grant funding qualifying standards.

claim that "[t]he removal of the 'common law dui' language evidences an intent to strictly require all DUI's be proven through breath, blood or urine test results" is absolutely incorrect.

In summary, neither Ordinance 16-PP strengthening alcohol and liquor laws nor Ordinance 16-NNN adding further punitive provisions to CTC § 4-5-9 -- but both implementing National Highway Traffic Safety Administration incentivizing reform laws cracking down on alcohol, liquor, drug and other controlled substance impaired driving -- reflect anything suggesting a Tribal Council intent to repeal common law DUI violations upon reservation lands.

The same logic, analysis and conclusion apply as well to demonstrate that the Tribal Council's intent through passage of Ordinance 16-NNN with its new CTC § 4-5-9 was to retain criminalization of the common law DUI. The guiding Legislative History of .08 *Per Se* Laws Final Report, DOT HS 809 286, July 2001 that documents the implementation of President Clinton's March 3, 1998 Presidential directive promoting a national limit under which it would be illegal to operate a motor vehicle with a BAC of .08 or higher, "regardless of whether or not the driver exhibits visible signs of intoxication" and setting the funding bar alluded to in Tribal Ordinance 16-PP, clearly incorporates common law DUI within its grant qualifying requirements. In fact, Endnote 2 to that legislation for 13 USC §§ 402 and 408 grants states:

> 2. The use of the acronym "DWI" throughout this report refers to the criminal action of driving a motor vehicle, either 1) while "*illegal per se*" or 2) **while impaired, under the influence, or while intoxicated by** either **alcohol** or other drugs. Usage of the term "DWI" and other acronyms (DUI, OWI, OUI) varies from state to state based on the different statutes in each state.

(Emphasis added.)

Endnote 2 above's reference to "the criminal action of driving a motor vehicle . . . while impaired, under the influence, or while intoxicated by.... alcohol" can only mean common law DUI. By rationale, CTC § 4-5-9 likewise includes common law DUI.

Legislative Source Document: "Source document" is a term often used to identify the statutory text of another jurisdiction or of a Model Legal Code that a given code provision largely tracks. In the case of the January 23, 2002 enacted language of CTC § 4-5-9, the wording of Chapter 527 of the 1996 Mississippi General Session Laws and Chapter 367 of the 2002, Senate Bill No.2848, tracks nearly *verbatim* even the present-day MS Code § 63-11-30(1)(a) (2015), excepting minor editorial errors of the tribal code statute. By so near-exact mirroring of either of the then-available versions of Mississippi's DUI statute which contain language criminalizing common law DUI which begins virtually identically to CTC § 4-5-9's introductory text portion of Mississippi initial common law part, we again see a compelling indicator the Tribal Council's

intent that the language of CTC § 4-5-9's text portion was meant to be worded in such a way as to also criminalize alcohol common law DUI as a Class B offense in its New Tribal Traffic Code.

Court Revised CTC § 4-5-9 Text Rectifying Scrivener's Error: In the final analysis, this Court considers the common law Scrivener's Error Doctrine. "The scrivener's error doctrine, broadly speaking, is a common law doctrine allowing courts encountering legal documents they believe to be in error due to a *vitium scriptoris -- literally* 'the mistake of a scribe,' or any 'clerical error in writing'-- to ignore the error and apply instead what they believe to be the correct law." BLACK'S LAW DICTIONARY 1567 (7th ed. 1999) at p. 563. The Doctrine of Scrivener's Error is an error due to a minor mistake or inadvertence and not one that occurs from judicial reasoning or determination, if and only if such mistake is "absolutely clear." Courts are to do so sparingly, for to do so unnecessarily would be a clear usurpation of a power of legislative governance; that is, a form of "judicial activism" this Court, and most all other courts, are reluctant to exercise. However, the opposite corollary to courts' abstaining from invoking this doctrine where a mistake in statutory text wording is "absolutely clear" and would result in absurd or mischievous consequences if the defective text were mindlessly adhered to, is in itself an even more damaging form of "judicial activism" – particularly where a different legislatively intent is manifestly apparent.

This Court finds that to clarify and correct CTC § 4-5-9's present text portion from its otherwise vague, ambiguous, misleading, and -- if read in its strictest literal sense – absurd consequences, as required by the Choctaw Tribal Code and supported by the Scrivener's Error Doctrine, the Court needs only to insert a simple two-letter article preceded by a comma after the initial clause is all that is required to clarify and encompass the obvious prohibition of common law DUI. As one scholar writes, "[t]he business of textual criticism is to produce a text as close as possible to the original...." Paul, Maas, Textual Criticism 1 (*Barbara Flower trans*., 1958). We accordingly find that utilizing the Scrivener's Error Doctrine, the current CTC § 4-5-9 should actually read:

> "It is unlawful for any person ***who is under the influence of intoxicating liquor*** to drive or otherwise operate any vehicle within the Choctaw Reservation***, or*** when that person has an alcohol concentration of ten one-hundre***d***ths percent (.10%) or more for persons who are above the legal age to purchase alcoholic beverages under state law or two one-hundre***d***ths percent (.02%) or more for persons who are below the legal age to purchase alcoholic beverages under state law...."

(Emphasis and underlining and italics added.)[11]

Doing so complements present-day courts' operation under recognized Rules of Statutory Construction through the "Purposive approach" to interpret an enactment within the context of the law's purpose and legislative intent. Its utilization is particularly appropriate here as the wording is otherwise ambiguous or leads to an absurd outcome/consequence rather than that legislatively intended by the Tribal Council and federal legislation. Finally, it fulfills our role duly assigned us by CTC §§ 1-5-7(4), (6) & (7).

Procedural Due Process: As other assignments of procedural due process errors raised by Appellants emanate from the multifarious code interpretations of CTC § 4-5-9 with CTC § 4-5-10, our ruling here that common law DUI is a prosecutable Class B offense under CTC § 4-5-9 makes self-evident the other standard charging requisites necessary to sufficiently apprise accused of the nature and cause of the specific incident alleged them so as to properly prepare a defense and serve as a bar against double jeopardy must be met. Both complaints do so, as each alleges the name of the accused; both allege violations of CTC § 4-5-9 as a Class B offense; both allege the jurisdiction place where the offense was committed; both include the date and approximate time of the offense committed; their operation of a motor vehicle while under the influence of alcohol; and the signature of the complainant together with each's attestation under oath to the truth of the matters stated in the complaint. In short, all requirements of Rule 4(a) and (b) (1 - 5) of the Choctaw Rules of Criminal Procedure were sufficiently complied with.

Wherefore, premises considered, we find Appellants in both of their respective prosecutions and convictions were duly afforded their due process rights and protections which were guaranteed them under the Tribal Constitution; the Indian Civil Rights Act; and Rule 3(b) of the Choctaw Rules of Criminal Procedure to know the nature and cause of the charges against them.

However, this Court finds that the common law DUI conviction as a Class B offence of Appellant McClelland was not supported by the evidence presented against defendant. The arresting officer's testimony did not support a finding of probable cause to justify an investigatory traffic stop. "An officer may initiate an investigatory stop . . . as long as the officer has an 'objective manifestation that the person stopped is, or is about to be, engaged in criminal activity[.]'" *Reynolds v. City of Water Valley*, 75 So. 3d 597, 600 (Miss. Ct. App. 2011)(quoting *McCray v. State*, 486 So. 2d 1247, 1249-50 (Miss. 1986)(quoting *United States v. Cortez*, 449 U.S, 411, 417 (1981)). The officer testified that he was assisting another officer when he heard someone "holler or yell" and that he went to the "residence up the road" to "check up on what the situation was." When the officer arrived at the other residence, he saw a car parked in the driveway. The officer testified that upon investigation of Appellant McClelland's parked car, he

[11] The addition of the phrase "***who is under the influence of intoxicating liquor***", the word "**, or**", and the letters "***ny***" designates changes in the wording and punctuation needed to correct the *scrivener's error* to encompass criminalization of common law DUI, and the insertion of two alphabet letters "***d***" in the word "hundre*d*ths" designate additions of the phrase and letters that had been omitted from the Tribe's website version of CTC § 4-5-9 when transcribing from the original ordinance 16-NNN.

"noticed the smell of alcoholic beverages on her person, breath. Her eyes were red and glossy. Her speech was slurred." When asked by the officer if Appellant had been drinking, the officer admitted that the Appellant answered "too many" in a joking manner. The officer testified that he did not conduct any field sobriety tests before placing Appellant under arrest for DUI. Therefore, DUI conviction as a Class B offense in regard to Appellant McClelland is overturned.

In regard to Appellant Bell, Officer Joe testified that he saw the vehicle fail to use a turn signal when turning on to Ball Park Cove, and that he observed Appellant Bell "getting out of the driver's seat" and to have "red, glassy eyes, slurred speech, unsteady on feet, and alcohol emanating from her breath." "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v. United States*, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). Appellant Bell refused the breathalyzer test. Officer Joe testified that he did not administer a standardized filed sobriety test (e.g., one-leg stand, horizontal gaze, etc.) although he had received standardized training on field sobriety tests as part of his police academy training which he had passed and had received other training on administering field sobriety training. Officer Joe testified that he was awaiting certification from the additional specialized training. Officer Joe provided no context or evidentiary support for his conclusory statement that Appellant Bell was "intoxicated." As this Court stated in *Donavan Allen*, the absence of field sobriety testing alone is not enough to overturn a conviction when there is other supporting evidence that Appellant is operating a vehicle while under the influence of intoxicating liquor. Accordingly, the DUI conviction as a Class B offense of Appellant Bell is overturned.

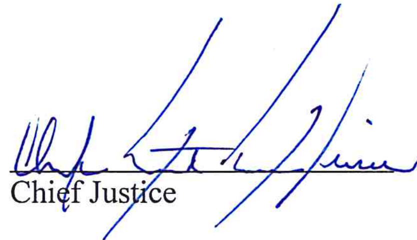
Driving Under Suspension or Revocation, Class B: Appellant Angela Bell further appeals her driving while suspended conviction. At trial the arresting officer, over defense objections, was allowed to testify that he was told by dispatch and by the defendant that her driver's license was suspended. Later in the proceedings defense counsel requested a directed verdict of acquittal, stating: "I would ask for a directed verdict on . . . the driving under suspension. Your Honor, they never produced anything to us or to this court to show that her driver's license was suspended." [Tran. P. 20.] In order to prove the CTC §4-5-3 charge of
Driving Suspension or Revocation, the prosecution is required to introduce into evidence official documentary proof of suspended status issued by the Mississippi Department of Public Safety. Rule 902 of the Choctaw Rules of Evidence sets forth the procedure and requirements, including the Rule 902(k) (3) precondition that the prosecution give notice to the defense of the intent to offer the records as self-authenticating under this rule and provides "a copy of the records and of the authenticating certificate. Such notice must be given sufficiently in advance of the trial or hearing at which they will be offered to provide the adverse party a fair opportunity to consider the offer and state any objections." None of this was done and therefore the defense motion for a directed verdict of acquittal should have been granted for the reasons stated.

Reckless Driving, Class B: The offense of reckless driving requires proof of willful disregard to the safety of persons or property. Failure to use a turn signal without more evidence supporting

the charged offense fails to arise to a level of reckless driving. No evidence was presented to the trial court showing or attempting to show proof of willful disregard to the safety of persons or property. Therefore, the conviction for reckless driving, Class B, is overturned.

<u>Traffic Control and Signal Devices, Class C</u>: Appellant Bell claims Officer Joe lacked probable cause or reasonable suspicion for the stop. The Court defers to the trier of fact for the veracity of witnesses. Judge Gibson's conclusions of law based on the witness testimony of Officer Joe that he stopped Bell due to her failure to properly use her turn signal and of Officer Ketcher who testified that she arrived just after Officer Joe and saw the vehicle in motion. As stated above, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." Whren at 810. The conviction for failure to properly use signal devices, class C, is affirmed.

SO ORDERED, this the 20th day of December, 2019.


Chief Justice

Associate Justice

Associate Justice

CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 20th day of December, 2019 cause to be forward by electronic mail, United States mail and/or hand delivered, a true and correct copy of the above and foregoing document to the below listed counsel of record.

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