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

**CLIFTON WILLIS** **APPELLANT**

**V.** **CAUSE NO. SC 2017-08**

**MISSISSIPPI BAND OF CHOCTAW INDIANS** **APPELLEE**

## OPINION AND ORDER

## PROCEDURAL HISTORY

Appellant Clifton Willis appearing *pro se* herein appeals his August 7, 2017 bench trial and conviction on a single count charge of intoxication in violation of CTC § 3-6-21, a Class C misdemeanor alleged to have taken place on or about the 29th day of April, 2017 in the Pearl River community of the Choctaw Indian Reservation. At trial the prosecution put the arresting officer on as its single witness. The defendant, acting as his own attorney, then called the Tribe's other available police officer to testify as part of his case in defense. The defendant also took the stand and testified on his own behalf. Thereafter brief closing arguments were held and the court found Willis guilty. It appears from the transcript that the trial judge's in-court pronouncement that date of sentence was simply that he forfeit the $100.00 cash bond he previously posted to be applied to his fine. The Court then confirmed to him that he was free to go.

The written Judgment of Conviction that was thereafter filed August 8, 2017, however, additionally indicated he was sentenced to thirty (30) days detention with said detention suspended and that failure to comply with the terms of the probation or the Court's orders, will subject the defendant to further action of the Court. The written Judgment of Conviction entered that next day therefore was materially at variance with his in-court sentence and not entered or imposed in his presence.

On September 6, 2017 Defendant/Appellant duly filed his notice of appeal, and he requested and was granted leave to proceed *pro se* and *in forma pauperis*. Both parties briefed their issue and oral arguments were had July 12, 2018. The case having then been submitted, this Opinion and Order ensues.

## STATEMENT OF THE FACTS/CASE

Appellant Clifton Willis on April 29, 2017 telephoned the Choctaw police department requesting that an officer be dispatched to a possible domestic dispute and drinking at his residence at 198 Wolf Trail in the Pearl River community. Police Officers Carl Isaac and Cpl. Ryan York responded. After speaking with the appellant and with Gloria Willis, Officer Isaac decided to simply take Mr. Willis away to another residence location at Second Duplex, the home of Lyndon Thomas. He was transported there for a 24-hour period of separation and to sleep off his apparent intoxication. Later that night, however, an unnamed person called dispatch to have an officer go check on Mr. Willis at the location where Officer Isaac had earlier removed him to. The responding officer went to Second Duplex, only to be told by Lyndon Thomas that Gloria Willis had earlier arrived at his residence and that she had taken Mr. Willis away.

Later that night Officer Joshua William Denson was on another call and saw Mr. Willis asleep on the front porch swing at the home of Clara Johnson. Beside him was an opened 12-pack of beer. Officer Denson called Officer Isaac, who, upon arriving, arrested appellant on the intoxication charge. Only during trial did Officer Isaac learn of the actual circumstances underlying appellant's having left the original place Officer Isaac had earlier relocated him to.

At trial's conclusion the lower court judge announced a finding of guilt "based on the officers' testimony, first by giving him a warning and then locating him at another location." Concerning sentencing, the judge said, "[H]e did place a cash bond, so that will be forfeited and applied to his fines. Thank you. That's it." [Tr. T. pp. 30-31.] The next day, however, a Judgment of Conviction submitted by the Atty. General's office, but not signed off on by defendant, stated additionally that a sentence of 30 days of detention was imposed and suspended and that failure to

comply with the terms of probation or the court's orders, will subject the defendant further action of this Court."

Defendant/Appellant duly filed his *pro se* Notice of Appeal as well as Appellant's brief and reply brief. He further participated in oral arguments to this Court.

## ARGUMENTS AND ANALYSIS

### *Issues raised by Appellant*

The bases of Clifton Willis' *pro se* appeal are his claimed unlawful arrest by virtue of not being advised of his "Miranda rights" nor being given a breathalyzer test when arrested, and instead his being arrested just based on the observations and opinion of an officer. He also claimed that there is no code provision for Public Intoxication. His reply brief addresses appellee's claim that the Choctaw Police Department's policy does not allow an officer to conduct a breath test for the charge of intoxication and that violates defendant's right to have a breath test as prescribed by the intoxication code section. Lastly, he claims the evidence was insufficient to prove he was guilty of intoxication. We address each issue he raises as well as his improper sentencing.

**Intoxication vs. Public Intoxication Code Violations:** Treating first appellant's claim that there is no code provision for Public Intoxication, that is not the offense defendant was charged with. Instead, the complaint charges him with a violation of CTC § 3-6-21, which is simply captioned "Intoxication" and not "Public Intoxication." The Code provision § 3-6-21 Intoxication provides initially as follows:

> It shall be unlawful 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.

Appellant's contention that there is no code provision for Public Intoxication *per se* therefore is a non-issue in that it has never been alleged that, nor was he prosecuted

for violation under any public intoxication code provision. This Court's memorandum opinion and order in the case captioned *Mississippi Band of Choctaw Indians v. Mack Hayes Anderson,* SC 2004-9 expressly recognized that CTC § 3-6-21 encompassed non-public as well as public intoxication. We wrote: "Thus, the offense of 'intoxication' can be committed 'anywhere within the limits of this jurisdiction' and is not limited to the public's sphere, but can take place in private as well." *Id.* at p. 3. Appellant's no-code provision for public intoxication argument is therefore rejected.

**Advising arrestees of Miranda rights:** Appellant also claims his arrest was unlawful by virtue of the fact that he was not given his Miranda warnings upon arrest as provided by law.

Rule 6(d) of the Choctaw Rules of Criminal Procedure (CRCrP) governing arrests does in fact mandate that, "(d) When any person is arrested for any offense under Code, he **shall** be informed of his/her right to remain silent, that any statements made by him may be used against him/her in court, and of his right to the advice of legal counsel at his own expense or from Choctaw Legal Defense, if the person arrested is an enrolled Tribal member of the Mississippi Band of Choctaw Indians." (emphasis added).

Notwithstanding Rule 6(d)'s mandate, however, failing to so Mirandize an arrestee at the time of being taken into custody does not in and of itself cause any arrest to be unlawful. The reason it does not delegitimize such arrests is that CRCrP Rule (6)(f) does go on to provide that "[f]ailure of the arresting officer to advise the defendant of his rights at the time of the arrest shall not cause the arrest to be unlawful, but any statement made after the arrest may not be used against the defendant in court."

By virtue of the above analysis and discussion, appellant is correct to the extent that his arrest did not comply with the requirement to "Mirandize" in the form required by tribal law, but by virtue of last quoted portion of Rule 6 the "failure of the arresting officer to advise the defendant of his rights at the time of the arrest shall not cause the arrest to be unlawful." Appellant arrest without Mirandizing was therefore procedurally improper and not unlawful; therefore, that claim alone would

not be grounds for reversal of a conviction. Nevertheless, since Rule 6(d) initially states that any person arrested for a Tribal Code violation "shall be informed" of certain specific rights, law enforcement should itself comply with what the law calls upon them to do whenever making an arrest.

**No breathalyzer testing for intoxication:** We address next, and jointly, the intoxication arrest without the use of the breathalyzer issues appellant raises. There appears to be significant confusion, uncertainty and misinformation attendant to the understanding of the law within tribal law enforcement policies and practices, and, conceivably, as well within the lower courts. The following transcript excerpts from the record below reflect this incertitude, particularly in the transcript segments below where defendant also questioned the officer's right to arrest him without his being administered an intoxilyzer test. Per the transcript:

> Question: If I was charged with intoxication, do you do a breath test?
> Answer: Not for intoxication. For driving under the influence, we do.
> Question: Well, how do you know if a person is drunk if --
> Answer: Based on training.
> Mr. Willis: Judge, I think we should – I shouldn't be charged with this because he doesn't have evidence of my blood alcohol stating I'm drunk.
> The Court: It's only for DUIs is a Breathalyzer test, and with intoxication it's observation. And he noticed all the different signs on you, and that's what he's going by.

(Tr. P. 12.).

At one time in the history of the Tribal Code there was in fact no mention of provision for administering intoxilyzer testing as a means to prove CTC § 3-6-21 Intoxication violation. For instance, by Tribal Ordinance No. 16-YYY enacted

April 15, 2005, the Tribal Council did revise the Intoxication status section then designated as CTC § 3-6-21 so that it then read simply:

> **§ 3-6-21 Intoxication**
>
> It shall be unlawful for any person to be found in a drunken or intoxicated condition anywhere within the limits of jurisdiction, a person shall upon conviction be deemed guilty of a Class C offense.

Since then, however, yet another subsequent ordinance has revised that wording such that CTC § 3-6-21 on Intoxication does now in fact make provision for intoxilizer testing. Read in its entirety, CTC § 3-6-21 now provides:

> **§ 3-6-21 Intoxication**
>
> It shall be unlawful 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 test is equal to or greater than one tenth of one percent (.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 two one hundredths of one percent (02%.)**
> **Intoxication is a Class C offense.** (Emphasis added.)

By the addition of that language emboldened above, the Tribal Council's intention has now been to add a more objective, verifiable means not simply for police officers to establish a subject's intoxication in those instances where suspects are in truth and by law intoxicated, and, conversely, also for those suspected, as here, of intoxication (or in simply borderline cases) to establish or procure evidence of their innocence.

The above notwithstanding, up until this point, as clearly shown by the transcript excerpts above, systemic law enforcement protocol and field practices have failed to take advantage of this enhanced technique of breathalyzer testing to ascertain intoxication. Neither has this been expected of them by either courts, prosecutors or defense counsel. All involved to date appear to have mistakenly operated within the confines of the original Code language. Had appellant been administered an intoxilyzer test in this present case before us, it might well have resulted in an outcome such that possibly either no charges were filed if testing indicated a BAC level of less than 10%, or that no appeal would have been taken if convicted based on a proven BAC test-level of 10% or higher. CTC §3-6-21 does not make this type of testing mandatory in intoxication cases, but whenever future administration of intoxilyzer testing is feasible, as a police and a prosecutorial tool its use might significantly reduce the unnecessary expenditure of police and judicial time and resources attendant to prosecutions for unlawful intoxication, and also bestow added public confidence in the policing and criminal justice systems.

Appellant's disbelief of the officer's claim that law enforcement's administering of intoxilyzer tests was unobtainable in connection with CTC §3-6-21 Intoxication arrests is justified, however its nonuse does not *per se* invalidate an otherwise valid arrest nor conviction absent other circumstances such as the absence of field testing which is discussed immediately below.

**Absence of field testing/Reliance on officer observations only**: Clifton Willis' *pro se* appeal also claims his arrest was unlawful by virtue of his being arrested just based on the observations and opinion of an officer. Stated another way, Appellant claims that his arrest was made without the police officer having sufficiently, nor properly, established probable cause for his arrest by the more objective and demonstrable determinations by field testing results.

In relation to what, exactly, Officer Isaac observed and perceived as his claimed basis for a probable cause determination, the pertinent testimony of the record elicited by the prosecution on direct examination is as follows:

Q. And when you saw Mr. Willis, what, if anything, did you notice about him?
A. He showed signs of intoxication.
Q. And what signs specifically did you personally observe?
A. He had a very strong presence of alcohol on his person, breath.
Q. Did you talk with him?
A. Yes.
Q. Did you notice anything about his speech?
A. Yes. It was slurred. And his eyes were red, and he was unsteady on his feet also.
Q. And he was unsteady on his feet.
A. Yes.

[T. Pp. 7-8.]

The follow-up cross-examination of the arresting officer by Mr. Willis firmly established that no further steps than the above observations and perceptions were taken to determine whether or not there was adequate probable cause to make an arrest.

BY MR. WILLIS, *pro se:*

Q. So, if the person is intoxicated like you said, you give them a field sobriety test?
A. No.
Q. Is that required?
A. No field sobriety test, just observation on intoxication. A field test is done when suspected of driving under the influence.

[T. P. 12.]

This is not the first occasion in which this Court has faced this issue of law enforcement making an arrest for intoxication based simply on officer observation

and conclusion, and without that officer having first conducted field sobriety testing. *Mississippi Band of Choctaw Indians v. Donovan Allen,* Cause No. SC 2013-03 (April 17, 2014) dealt with a nearly identical factual situation within the context of a Driving Under the Influence of Intoxicating arrest.

In *Allen*, as here, the arresting officer testified to the subject having the odor of alcohol, red eyes, slurred speech, and being unsteady on his feet. In this present case before us here we now hold, like we held nearing five years before in *Allen*, that all of those four combined observations and perceptions just enumerated, standing alone, are insufficient bases upon which to establish probable cause to arrest on intoxication charges. Each and all are purely subjective or intuitive impressions. The law requires more!
The *Donovan Allen* case references Page 2.8.2 of the Police Procedures Manual under the heading "*Field Sobriety Tests*" which that opinion quotes 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[.]

(*Id.* at p. 2.)

Notably, observation of a traffic violation may give a police officer the probable cause to stop a vehicle, but in order for that patrolman to establish sufficient probable cause to make an arrest for suspected intoxication, a minimum of three of the seven field tests must be administered to ascertain subject's intoxicated condition. This principle applies equally in simple intoxication charges. The

arresting officer having failed to do so at the time of his first encounter with the subject, appellant's point that his arrest was not unlawful on that basis is well-taken. It furthermore follows that insufficient evidence to support probable cause likewise fails to support the trial court's verdict of guilty on the charge.

**Guilt not otherwise evidentiarily or factually supported:** Accepting as we do that the officer's testimony in relation to that initially charged 2:36 AM encounter and interaction with appellant was insufficient to establish probable cause, much less proof beyond a reasonable doubt of appellant's intoxication at the time he was first transported to the second duplex home of Lyndon Thomas, the record of proceedings furthermore lacks sufficient additional information and proof that he was in an intoxicated condition when Officer Isaac later confronted and arrested appellant at the front porch of Clara Johnson's home. Nothing in the record indicates how much time passed from that 2:36 AM encounter and transport to Lyndon Thomas' residence, nor how much time lapsed from then to the time Officer Isaac located and formally arrested him on the front porch of Clara Johnsons' home. It is apparent, though, that the time would have been considerable.[1]

Furthermore, Clifton Willis testified that in the intervening time he ate a little supper at Clara Johnsons' home before sleeping on the front porch swing. [Tr. pp. 14, 27.] Both passing of time and ingesting of food tend to contribute to the dissipation of alcohol's effects and relative levels of intoxication.

What's more, the motivation for finally taking appellant to the Choctaw Detention Center seemed more to be, as Officer Isaac testified: "All I know is I seen you somewhere when I told you to sleep it off. You were somewhere else after I told you to sleep it off." [Tr. p.14.] Only at that point in the trial proceedings did Officer Isaac learn for the first time from appellant that appellant's wife had come to

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[1] Although not a part of the transcript of recorded proceedings, the Choctaw Detention Center Booking Sheet on Clifton Willis indicates a Booking Time of 6:04 a.m. but an Arrest Time of 2:15 a.m. This would constitute a near 4-hour lapse of time. CRCrP Rule 8(a)(2) provides that "if the arresting officer or complaining witness shall certify to the jailer or if the jailer shall certify based upon his own observation, that the person arrested, was at the time he was brought to the jail, unconscious or in an intoxicated or apparently intoxicated condition, or for any reason does not appear to be conscious or sober, then such person shall not be released until eight (8) hours after arrival at the jail."

Lyndon Thomas', where Officer Isaac had first taken him, and that she had been the one who carried him off. Once appellant was gone from there, an "unidentified caller" asked that a second officer go to check to make sure appellant was still at Lyndon Thomas' place.[2] In response to this caller's report, a second officer was in fact dispatched to Lyndon Thomas' home and that officer confirmed that appellant was gone from the Thomas residence. Later on defendant was discovered sleeping on Clara Johnson's front porch swing. It was in that manner the circumstances came about prompting Officer Isaac to ***then*** take appellant to detention for formal booking. Once again, however, there was absolutely no field sobriety testing prior to his arrest and transport to the Choctaw Detention Center for booking. For that reason our earlier discussion and application of the *Donovan Allen* pronouncements on field sobriety testing as being indispensable to a probable cause determination and arrest on intoxication charges apply equally to this second apprehension and detention.

Appellant's arrest during that second encounter was not simply absent any establishment then of probable cause of intoxication, but also his arrest appears the product of a duplicity perpetrated upon police and appellant alike. Clearly the ends of the criminal justice system were misused.

Equally clearly, defendant's guilt on the charge of intoxication was not otherwise evidentiarily or factually proven, either at the time of his first apprehension by Officer Isaac, or at the much later time of his second apprehension and transporting to the detention center and charging.

**Sentencing Discrepancies:** The trial court at the close of the trial announced one sentence in open court, but the next day there was filed a written Judgment of Conviction that had additional sentencing terms and conditions substantially

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[2] Appellee's Brief at page 3 headed "Statement of Facts" narrates that "{a}fter a phone call from Gloria Willis, Officer Isaac decided to go check on Mr. Willis at Second Duplex. One [*sic]* he arrived he spoke with Lyndon Thomas. Mr. Thomas stated that Gloria Willis arrived at the residence and took Mr. Willis." The trial transcript indicates it was an unnamed second officer and not Officer Isaac who went to check on appellant's whereabouts there. Appellee's brief's statement that Mr. Thomas stated that Gloria Willis arrived at the residence and took Mr. Willis is not contained in the transcript, but reflects particular details apparently available to the prosecution but not brought up in the court trial. Nonetheless, appellant testified that it was his wife who carried him off.

different and more severe than those that were announced and imposed in open court before the defendant.

In the trial transcript of the August 7, 2017 proceedings, the sentence imposed on defendant was simply the forfeiture of his $100.00 cash bond. He was then told he was free to go. The transcript reads as follows:

**TRIAL TRANSCRIPT**
*RULING OF THE COURT*

> THE COURT: In Cause No. 17-695, Clifton Willis, Sr., on the charge if intoxication, I am finding you guilty based on the officer's testimony, first, by giving him a warning and then locating him at another location. And I can't believe that two officers noticed some beer located beside him and he says he didn't see it. But he is guilty of the charge.
>
> He did place a cash bond, so that will be forfeited and applied to his fines. Thank you. That's it.
>
> MR. WILLIS: So that's the end of this?
> THE COURT: Uh-huh (affirmative response).
> MR. WILLIS: So I can leave?
> THE COURT: Right.
> MR. JORDAN: Thank you, sir.
> (WHEREUPON THE PROCEEDINGS WERE CONCLUDED.)

[Tr. pp. 30-31.]

The day following defendant's trial a Judgment of Conviction was filed in this case that did not correspond to the sentence the court imposed the day before. In addition to the $100.00 ordered cash bond forfeiture, there was added on a thirty-

day jail sentence to be suspended and a reference to the imposition of an indeterminate term of probation. That document reads in relevant part as follows:

**JUDGMENT OF CONVICTION** (Partial)

1. * * * * After testimony was taken and evidence offered and accepted by the court, the Court found the defendant guilty of Intoxication, Class C. The Defendant shall be assessed a total fine of $100.00 as provided under CTC § 3-1-3, ***and shall be sentenced to thirty (30) days of detention with said detention suspended.***

2. The Cash Bond in the file shall be forfeited and applied to the fine in the amount of ONE HUNDRED ($100.00) DOLLARS for the charge of Intoxication, Class C. ***Failure to pay the fines by the due date or failure to comply with the terms of probation or the Court's orders, will subject the Defendant to further action of this Court.***

(Emphasis added.)

The bold and italicized wording contained in the relevant excerpts from the above quoted Judgment of Conviction clearly are additional provisions and conditions that were not pronounced by the lower court in open session, but tacked on only sometime after the defendant had been released and had left the courtroom.

This manner of sentence(s) imposition violates rights and protections of CTC Title II's Rule 3(a) of its Code of Criminal Procedure which guarantee that "in all criminal proceedings, the defendant shall have, *inter alia*, the right to be present throughout the proceedings."

Additionally, that same CRCrP Rule 3 guarantees defendants under subsection 6(h) "the right not to be twice put in jeopardy for the same offense...." See also 25 U.S.C. § 1302(a); Article X of the Tribal Constitution of the Mississippi Band of Choctaw Indians; and Amendment V of the United States Constitution. Commonly

referred to as the "double jeopardy" prohibition, it actually consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against the second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U.S. 711, 717 (1969). Having had first the in-court sentence of forfeiture of his $100 cash bond as punishment, the following day's Judgment of Conviction filing that added the sentence of 30 days of detention (suspended) and his ordered probation of an unspecified term as additional punishments constitutes a clear violation of appellant's projection against multiple punishments for the same offense. In *Mississippi Band of Choctaw Indians v. Donovan Allen,* Cause No. SC 2013-03 (April 17, 2014), this Court had occasion to write extensively in recognition of these double jeopardy principles.

Premises considered, those portions of the Judgment of Conviction emboldened and italicized in the block-quoted excerpts immediately above constitute multiple punishments for the same offense and we therefore thereby render them null and void as well as the conviction itself.

## CONCLUSION

In summarizing our holdings, we determine and find that:

1. Appellant's claim that his objection to his being charged with Intoxication rather than a non-codified charge of Public Intoxication was immaterial and we reject that point of argument.
2. Appellant's objection to not having properly advised of his Miranda rights as is required by the first part of Rule 6(d) of the Choctaw Rules of Criminal Procedure was correct; however, by virtue of the later provision of 6(d) this failure to Mirandize at the time of arrest did not render his an unlawful arrest.
3. Appellant is correct in his claim that breathalyzer testing for persons suspected of intoxication is provided for by CTC's § 3-6-21 Intoxication statute; however, his arrest without this testing was not what made his arrest unlawful under the circumstances of his particular case.

4. Appellant's is correct that his arrest in reliance on officer observations only and in the absence of the administering of any field testing was improper in that it fails to sufficiently establish requisite probable cause for his arrest.
5. Appellant's claim that the verdict of guilty of intoxication was not otherwise evidentiarily or factually supportable is also well-taken and his motion to dismiss for that reason should have been granted.
6. This Court also finds that the discrepancies between the sentence pronounced in open court and the significantly harsher sentencing provisions later journalized in the Judgment of Conviction violate appellant's double jeopardy protections against multiple punishments for the same offense, and also violate appellant's guarantee in CTC CRCrP Rule 3(a) that "in all criminal proceedings, the defendant shall have the right to be present throughout the proceedings."

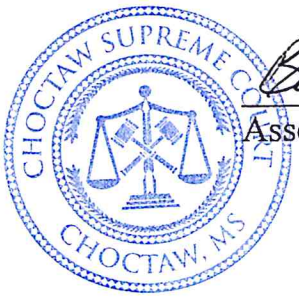
WHEREFORE, PREMISES CONSIDERED, this Court hereby ORDERS that appellant's conviction be and hereby is reversed, his sentence(s) vacated, and appellant be discharged from further proceedings in this matter, with all fine and other costs heretofore paid by appellant returned unto him.

SO ORDERED this the 3rd day of December, 2018.

Chief Justice

Associate Justice

Associate Justice



## CERTIFICATE OF SERVICE

I, do hereby certify that I have this, the 3rd day of December, 2018 cause to be forwarded 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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