NO. COA13-873 THIRTIETH A DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA, Appellee,	)	
v.	)	From: Swain County File: 10 CRS 00277
STEVEN CLARK KOSTICK, Appellant.	)	

DEFENDANT-APPELLANT'S BRIEF

INDEX

TABLE OF CASES AND AUTHORITIES

Cases:

Statutes:

Other Authorities:

NO. COA13-873 THIRTIETH A DISTRICT

NORTH CAROLINA COURT OF APPEALS

STATE OF NORTH CAROLINA,	)	
	)	
Appellee,	)	
	)	From: Swain County
v.	)	File: 10 CRS 00277
	)	
STEVEN CLARK KOSTICK,	)	
	)	
Appellant.	)	
_____	)	

ISSUES PRESENTED

I. DID THE TRIAL COURT ERR IN DETERMINING THAT THE ROAD ON WHICH THE DEFENDANT WAS STOPPED WAS A NORTH CAROLINA STATE ROAD WITHIN THE BOUNDARIES OF A FEDERALLY RECOGNIZED INDIAN RESERVATION?

II. DID THE TRIAL COURT ERR IN DENYING DEFENDANT'S PRE-TRIAL MOTION TO DISMISS THE CRIMINAL CITATION ON THE BASIS THAT THE NORTH CAROLINA STATE COURT LACKS JURISDICTION OVER THE DEFENDANT WHERE A NORTH CAROLINA HIGHWAY PATROLMAN ARRESTS HIM WITHIN THE BOUNDARIES OF THE CHEROKEE RESERVATION ON A ROAD WHICH IS NOT A FEDERALLY CREATED U.S. HIGHWAY BUT A TRIBAL ROAD?

III. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE ROADBLOCK ESTABLISHED BY THE EASTERN BAND OF CHEROKEE INDIANS DID NOT VIOLATE N.C.G.S.§ 20-16.3(a) AND WAS THEREFORE CONSTITUTIONAL?

IV. DID THE TRIAL COURT ERR IN CONCLUDING THAT THE NORTH CAROLINA HIGHWAY PATROL OFFICER HAD AUTHORITY TO ARREST THE DEFENDANT FOR AN IMPAIRED DRIVING OFFENSE?

V. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE DEFENDANT'S *KNOLL* MOTION TO DISMISS THE CITATION FOR VIOLATION OF THE DEFENDANT'S PROCEDURAL AND CONSTITUTIONAL RIGHTS?

STATEMENT OF THE CASE

The Defendant-Appellant was charged by the North Carolina State Highway Patrol with a driving while impaired offense on 24 April 2010 on the Cherokee Indian Reservation.(R.p.2). On 24 November 2010 the Defendant moved to dismiss and suppress the stop and arrest. After a bench trial on 6 April 2011 the Defendant was convicted in District Court and timely appealed the matter to the Superior Court Division. (R.p.56, the Judgment incorrectly denotes a plea was entered).

On 8 December 2011 Defendant filed a Motion to Dismiss in Superior Court re-alleging that the North Carolina Highway Patrol

had no arrest authority approved by the Federal Department of Interior or the Eastern Band of Cherokee Indians, had not been granted any State authority of arrest powers on a Federal Indian Reservation, and that the Defendant was not on any Federally granted right-of-ways and was in Indian Country at the time of his arrest by a State Highway Patrol Officer.(R.p.10). On 20-21 February 2013 the matter came on for hearing upon the Defendants motions and the Court denied same. (T.p.71,149,216). After a jury trial the Defendant was convicted on the 22 February 2013 and Defendant timely appealed. (R.p.33,42). The proposed Record on Appeal was served on 18 June, 2013.(R.p.54). The record was settled by law on the 22 July 2013, filed on 2 August 2013 and docketed on 6 August 2013. That on 26 August 2013, at the request of Counsel for Appellee, Appellant filed a Motion to Amend the Record on Appeal to add one document. The Motion was granted by this Court on 28 August 2013. On 2 September 2013 Appellant filed a Motion for Extension of Time to file a Brief and an Order was entered allowing the Appellant up to and including 23 September 2013 to file Appellant's Brief.

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

Appeal is authorized pursuant to N.C.G.S. §1-277 and N.C.G.S. §7A-27. "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

STATEMENT OF THE FACTS

Appellant-Defendant is and was a resident of Pickens, South Carolina. On 24 April 2010, the Defendant had come to Cherokee, North Carolina which is a Federally recognized Indian enclave existing within the State of North Carolina and has existed as a Federal enclave under the protection of the Congress of the United States since at least 1934. The Eastern Band of the Cherokee Nation is a recognized Federal Indian Tribe within the meaning of 25 USC §1, *et seq*. The Tribe decided in 1948 to expand its tourist activity and built an amphitheater which included the need for a road from U.S. Hwy 441 to the amphitheater. In 1950 the citizens of Swain County petitioned the Board of Commissioners of Swain County to request the State Highway Commission to construct a road to the amphitheater which was then leased by the Cherokee Historical Association (R.p.16). That road was known as Drama Road.(R.p.15-16). After the construction, the road has been maintained by the N.C. Highway Department since then.

The Defendant came to the Cherokee Harley Rally with his wife and at 10:00 p.m. left the fairgrounds and walked to the Museum of the Cherokee Indians parking lot. Defendant and his wife got into their vehicle and pulled onto Drama Road when the Defendant was stopped by a Cherokee Police Officer who directed the Defendant to back into the parking area and after a short time N.C Highway

Patrol Officer J. H. Hipp pulled in, conferred with the Cherokee Officer and approached the Defendant for purposes of investigating the stop which had been made by the Cherokee Officer. After detecting an odor of alcohol the N.C Highway Patrol Officer removed the Defendant from his vehicle, performed a series of tests and thereafter placed the Defendant under arrest and transported him to the Swain County jail where a breath test was performed on the Defendant and thereafter took the Defendant before the Swain County Magistrate. The Magistrate ordered the Defendant to be held until he was able to make a secured bond at which time he was released.(R.p.4).

ARGUMENT

I. The Trial Court erred in determining that the road on which the Defendant was stopped was a North Carolina State road within the boundaries of a Federally recognized Indian Reservation.

The Drama Road where the Defendant had been stopped is not a State road within the boundaries of the Eastern Band of Cherokee Indians. While the Trial Court found that this was a State road based upon the conduct and actions of the Swain County Board of Commissioners in 1950, this finding, violates the tenants of the United States Constitution.

Federal Law 18 U.S.C §7 sets out the territorial jurisdiction of the United States and defines the terms as being any land reserved or acquired for the use of the United States; 18 U.S.C. §1151 specifically provides that Indian Country is defined as:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities with the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

This has been the settled jurisdiction of the Federal Government since the adoption of this statute. The U. S. Constitution has always held that Indian lands are property under the protection of the United States Constitution. U.S. Const. Art. I, Sec. 8, cl. 3; Art. II, Sec. 2, cl. 2. Congress has the sole authority to set the pattern of Federal Indian Law as it relates to trade and the intercourse acts between the Indian Tribes and the Federal Government. The most seminal case that deals with the interrelationship and the relationship involved between a State and an Indian Tribe is the case of *Worcester v. Georgia,* 31 U.S. 515 (1832) In this opinion the Court held that Indian Nations "have always been considered as distinct, independent political communities retaining their original natural rights as the undisputed possessors of the soil, from time immemorial." Id at

519. The Court held that the whole intercourse between the United States and this Nation (Cherokee Nation) is by our Constitution and laws vested in the Government of the United States. In that case, the State of Georgia was trying to intrude on and to regulate the acts of the petitioner and required that *Worcester* file and obtain a license to sell Bibles and preach the Christian gospel to the Indians. The defendant in that action was claiming that he could not be subjected to the laws of Georgia and that the jurisdiction of the courts of Georgia over his conduct within the territory of the Cherokee Nation did not give the State the authority to charge him with any crime in violation of the Georgia laws which required him to be licensed to do business within those boundaries. The Court specifically concluded that the Cherokee Nation was "under the protection of the United States and of no other power." *Worcester* at 552. The Court further held that by the laws of the United States, Indian Territory was completely separated from that of the States and provides that all intercourse with them should be carried out exclusively by the government of the union. *Ibid* at 557. The Court held that "the Cherokee Nation is a distinct community within boundaries accurately described in which the laws of Georgia can have no effect in which the citizens of Georgia have no right to enter but with the consent of the Cherokees themselves or in conformity with treaties and with the acts of Congress." *Id* at 561. The Court held that the judgment

issued from the County of Gwinnett, State of Georgia was void and repugnant to the Constitution.

The *Worcester* decision is still good law today. The basic premise in American Indian law revolves around that relationship between the Federal Government and the Tribes. The act of the State not being able to enforce property rights and criminal laws within the boundaries of a Federal enclave is to protect the Tribe's relationship and to prevent States from adversely affecting the interest of the Indian Tribes within their boundaries.

In the present case, the County Commissioners of Swain County in 1950 had no right or authority to impose their request to allow the North Carolina Department of Transportation to build a State maintained road within the boundaries of the Eastern Band. The only way that a State may acquire a right-of-way in a Federal Reservation is under 25 U.S.C. §311. 25 U.S.C. §311 grants the only authority for opening highways across Indian Territory. §311 reads as follows:

> The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, <u>through</u> any Indian reservation or <u>through</u> any lands which have been allotted in severalty to any individual Indian under any laws or treaties but which have not been conveyed to the allottee with full power of alienation.[Emphasis supplied].

It is clear from this particular statute that grants the power to the Secretary of Interior, only right-of-ways which may be authorized are public highways which traverse or run through an Indian Reservation. It is clear from the testimony of Teddy Green, 14th Division Engineer of the State of North Carolina, no grant of right-of-way was given by the Federal Government or the Secretary of Interior to the State of North Carolina for a right-of-way for the Drama Road.(T.p.18,l.3-9; T.p.19,l.16-20). In this case that the only road that was built in Cherokee, North Carolina in 1950 ran from U.S. Hwy 441 and dead-ended at the amphitheater.(R.p.19-20). Furthermore, there is no showing by the State in the prosecution of the Defendant that the area where the Defendant was located was anything other than Federal land within the Eastern Band and was a Tribal road. The testimony of Officer Wright of the Cherokee Police Department identified the location of the Drama Road as being within the Qualla Boundary.(T.p.33,l.7-18). Also see *Rosebud Sioux Tribe v. South Dakota,* 900 F. 2d 1164, 1990 U.S. App. LEXIS 3934, (8th Cir. 1990). The State of North Carolina had no right to claim any use of that road as a county road as found by the Trial Court.

II. The Trial Court erred in denying Defendant's pre-trial motion to dismiss the criminal citation on the basis that the North Carolina State Court lacks jurisdiction over the Defendant

where a North Carolina Highway Patrolman arrests him within the boundaries of the Cherokee Reservation on a road which is not a Federally created U.S. Highway but a Tribal Road.

The issue before this Court is whether the State Court of North Carolina has jurisdiction to prosecute a non-Indian in the State Court of North Carolina for driving while impaired where the Defendant was on Indian land within a Federal enclave. In this matter the Defendant was sitting in the parking lot of the Cherokee Museum located on the Indian reservation and pulled onto Drama Road and was stopped by a Cherokee Officer. After that Officer told the Defendant to back off of the road, a N.C Highway Patrolman traveling on Drama Road pulled in and spoke with the Defendant and after administering a series of tests placed him under arrest for driving while impaired. The case upon which the State relied at the Trial Division was the case of *State v. Dugan,* 52 N.C. App. 136, 277 S.E.2d 842 (1981). In that case the Defendant who was Indian was tried in Swain County and convicted of a traffic offense and raised the issue that the State of North Carolina had no jurisdiction to prosecute her where the citation occurred within the boundaries of the Cherokee Nation. This Court affirmed the Trial Court's conviction on the basis that *Dugan* did not have to be tried in Federal Court or Tribal Court and that the State has exercised at least concurrent jurisdiction to try Indians for

crimes committed on the Indian Reservation. The Court further held that Congress could have preempted the State of this jurisdiction but has not done so. *Dugan* at 139, 844. The holding of the panel of the Court of Appeals is wrong. It is not the duty of Congress to preempt North Carolina from having jurisdiction to prosecute matters upon a Federal enclave within the State. Congress may only allow a State to have concurrent jurisdiction if it deems appropriate. *See* 18 U.S.C. §1162. No State can claim jurisdiction within Indian Country or even claim concurrent jurisdiction in Indian Country unless it is given to them by the United States Constitution or by acts of Congress.

The clearest decision in this regard is *Worcester v. Georgia*. Since 1832 it has been well established in American Indian law that Congress, not the States have the sole jurisdiction over Indian Country. This position established under *Worcester* was settled law until the decision set out in *United States v. McBratney*, 104 U.S. 621 (1881) wherein the Supreme Court questioned the holding of *Worcester* by finding that because of Colorado's admission to the Union on equal footing with the other States and no exception being made for the Ute Reservation, the Federal Courts had no authority to try a non-Indian where he was accused of murder of another non-Indian on Indian lands (Tribal). This holding is totally inconsistent with *Worcester* and the holding of *McBratney* was also repeated in 1892 in the case of *Draper vs. United States*,

164 U.S. 240, 17 S.Ct. 107 (1896). This Court held that the State Enabling Act remained authoritative for purposes of State power over non-Indians in Indian Country for many years.

These rulings changed the way Courts looked at Indian vs. Non-Indian conduct on Indian lands. This opened the Courts to apply (1) a balancing test of inquiry into the identity of the parties; (2) notice of the conduct or subject matter on Indian lands and; (3) a determination of the acts complained of.

In 1959, the Supreme Court revisited the articulation of these tests as related to State jurisdiction on Indian lands. In *Williams v. Lee,* 358 U.S. 217, 79 S.Ct. 269 (1959) this Court looked at a suit by a non-Indian brought In a State Court against two Indians for goods sold to them while on the Navajo Reservation. The Supreme Court held that the State Courts had no jurisdiction. The Court re-adopted the holding of *Worcester* and further said if a crime was by or against an Indian that Congress has the sole control over the jurisdiction.*Id at* 254. The Court in *Lee* also pointed out that Congress, by the adoption of Public Law 280 (18 U.S.C §1162) had provided the sole means for a State to acquire civil and criminal jurisdiction in Indian Country. *Id* at 223. North Carolina has never been made a participating State under this Act. While the opinion in *Lee* protected Tribal jurisdiction, the decision and test it adopted opened the States to increased power within reservations. The various Court decisions in light of *Lee*

resulted in a lot of uncertainty about the application of the ruling in *Lee*. Later, the United States Supreme Court put to rest the dispute of the States expansive reach into Indian Country but added additional inquiries into the argument of State/Federal jurisdiction. The Court in *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257 (1973) took the position that it was only when the State asserted its power to control or effect non-Indians in Indian Country that it was appropriate to look at the balancing of Tribal and State interests to determine if State jurisdiction would infringe upon Tribal self-governing. The Federal Courts have held that State law is preempted by operation of Federal law if it interferes with or is incompatible with Federal and Tribal interests reflected in the Federal law.

Turning to the case before this Court, the issue must be reviewed as to the effect of the North Carolina State Courts claiming jurisdiction over an Indian road in which a non-Indian was charged with a motor vehicle offense of driving while impaired. The United States Congress has adopted 18 U.S.C §7 and §13 which applied State criminal law in Federal jurisdiction. The Federal Government has also adopted its own version of a driving while impaired statute applicable to Federal jurisdiction. See 18 U.S.C.§13(b)(1),(b)(2)(A). Federal law was violated by the Defendant's conduct within Indian land. However, the additional analysis of the Defendant's conduct must be reviewed in light of

the cases herein cited to determine if the crime or the State where it occurred falls within the Federal Act (18 U.S.C. §1162) or whether by operation of law, the State of North Carolina has jurisdiction to try the Defendant. It is clear that North Carolina does not fall within Public Law 280 (18 U.S.C. §1162). Therefore, it must be determined by operation of Federal case law that the State of North Carolina has jurisdiction to prosecute the Defendant.

Based upon the case law and Federal statutes, States have no jurisdiction over crimes by Indians against anyone or non-Indians against Indians. It is only when the crimes are committed by non-Indians without any victim related to the criminal offense that the States have jurisdiction. In the present case, the State claims that *State v. Dugan* stands for the proposition that North Carolina Courts have jurisdiction because this case is a motor vehicle speeding case and therefore a victimless crime so that the jurisdiction is in the State Court to try an offense committed by a non-Indian occurring on an Indian Reservation. However, the crime must be truly victimless. See *Solem vs. Bartlett,* 465 U.S 463, 104 S.Ct. 1161, Foot Note 2 (1984). The ultimate question for this Court turns on the classification of the criminal act of which the Defendant was charged. The Appellant maintains that the charge of driving while impaired is not a truly victimless crime. Driving while impaired has an effect on both Indian and non-Indian within

the Boundaries of the Eastern Band of Cherokee Indians. The most pertinent holding available for this Court's consideration is the United States Court of Appeals of the Eight Circuit which defined Driving While Under the Influence and its relationship to the Public at Large. In *United States v. Thunder Hawk,* 127 F. 3d 705 (1997), the Court set out that the crime of driving while impaired is not a victimless crime. By defining it in the context of a crime for which it stands, that Court said;

> Moreover the offense of Driving Under the Influence is more akin to the offense against the Public at Large, both Indian and non-Indian, rather than a true 'victimless' crime. See eg *United States vs. Sosseur*, 181 F.2d 873, 876 (7th Cir. 1950. *Id* at 709.

The Eighth Circuit held that an Indian could be tried in Federal Court because the crime while committed in Indian country was not a victimless crime and therefore subject to Federal jurisdiction. It is clear that North Carolina has considered driving while impaired a serious criminal violation and it is also an offense which puts the public at risk. If this Court, in considering the impact of this crime as a victimless crime, is to do so just to provide the State of North Carolina with jurisdiction it would do no justice to the true nature of the charge recognized in this State. If this Court determines that driving while impaired is a serious criminal violation which puts the public at risk and would violate both the property interests and liberty of Indian and non-Indian within the Qualla Boundary, then the case is

not truly victimless and therefore sole jurisdiction of this criminal offense would be Federal District Court. A crime committed by a non-Indian which has a victim places sole jurisdiction within the Federal system.

III. The Trial Court erred in concluding that the roadblock established by the Eastern Band of Cherokee Indians did not violate N.C.G.S.§ 20-16.3(a) and was therefore Constitutional.

The Eastern Band of Cherokee Indians as an Indian Tribe has the undisputed authority to employ police officers to aid the enforcement of Tribal law in the exercise of Tribal power. See *State v. Schmuck,* 121 Wn. 2d 373, 382, 850 P.2d 1332 (1993). However, the North Carolina Highway Patrol only garners its authority from the State of North Carolina under the statutory criteria established in N.C.G.S §20-184 *et. seq.* The duties of the North Carolina Highway Patrol are set forth under N.C.G.S. §20-188. In this statute the Highway Patrol shall regularly patrol the highways of the State and enforce all laws and regulations respecting travel in the use of vehicles upon the highways of the State. Nowhere in the authority of N.C.G.S. §20-184 *et seq.* does the North Carolina Highway Patrol have any authority to cooperate with any Federal agency or Indian Tribe to enforce traffic laws within Indian Country as defined by 18 U.S.C. §1151. The only

statutory authority which provides cooperation between the Highway Patrol and other agencies is with approval of the Governor, and deals with the cooperation between Highway Patrol and municipal and county police officers of the State in enforcing uniform driver's license laws and arrangements set out therein. See N.C.G.S. §20-188. There is nothing in the record presented by the State that the Highway Patrol had any Federal authority to be conducting police actions within the Federal enclave on 24 April 2010. In fact the testimony of Line Srgt. Norville clearly states that there was no mutli-agency agreement authorizing the Highway Patrol to patrol on Cherokee Lands and no approval was obtained from the First Sergeant to assign his Troops to the Indian Reservation on 24 April 2010. (T.p.86,l.24-T.p.88,l.1). In addition, the arresting officer, Trooper Hipp acknowledged that at one time the Highway Patrol was actually issued a Bureau of Indian Affairs card but that the Highway Patrol stopped using those cards approximately seven to eight years ago (T.p.48). Over objection of counsel, the Defendant proffered the purposes for which the BIA card was offered to the Highway Patrol and that it included the taking of a picture and paperwork specifically providing that the Highway Patrol had jurisdiction within the Eastern Band upon lands known as Indian roads that they could provide services of law enforcement activity (T.p.49). However, on the date of the arrest of the Defendant in this case the Trooper's BIA card had

expired.(T.p.49,l.17). It is clear from the record in this case that there was no evidence that any cross-deputation occurred between the Eastern Band Police Department and the State of North Carolina which grants officers, Indian or Federal, authority to enforce Federal crimes within the Federal enclave. In the present case, the Chief of Police of the Eastern Band requested the Line Sergeant for Swain and Graham County to provide assistance for a Harley Rally on 24 April 2010 (R.p.23). This letter was addressed to no one in particular but it was received by Highway Patrol Line Srgt. Todd Norville. Once Highway Patrol Line Srgt. Norville received the request he scheduled Troopers to participate in the Harley Rally. It was clear at that time that Sergeant McMahan was the First Sergeant of the Swain and Graham County Troop and that he did not obtain any approval as required by Highway Patrol Directive K.04 to conduct a checking station pursuant to this request. (R.p.24-27;T.p.86, l.24-T.p.88,l.1).

It is clear that the NC Highway Patrol had just been requested to assist the Cherokee Police Department and that it was the Cherokee Police Department that created the road block which the Appellant came upon at 10:00 p.m. on 24 April 2010. On that evening, the First Srgt. did not approve a multi-agency task force for the purpose of this Rally (T.p.87,l.16-23; T.p.88,l.). Srgt. Teesateski of the Cherokee Police Department testified that he was the Traffic Enforcement Sergeant on August 24, 2010 and while they

had a plan or procedure for a road checking station he did not have it available because he could not find it.(T.p.101). He was able to testify that he believes there was a written plan but he could not testify to the beginning or ending of the plan or the circumstances which gave rise to the plan other than they had to check each car that was stopped and had to have a supervisor on scene (T.p.92-94). Officer Teesateski was not able to establish when the particular road block started or when it ended. The stopping officer, Srgt. Dustin Wright, could only testify that he did not see a hard copy of the plan he was simply briefed on what his conduct was at the checking station (T.p.126,l.1-7). He also testified that the arresting officer, Trooper Hipp of the Highway Patrol did not participate in the checking station that evening (T.p.123,l.19-21). The arresting officer Trooper Hipp only pulled up to the scene about 5 minutes after he requested a State Trooper.(T.p.124,l.15-19). In fact the only part of the plan which he was able to recall was that he was to continue conducting the checking station when possible and have a State Trooper investigate possible drunk drivers (T.p.125,l.18-25). When asked by the State as to when the plan was to terminate, the only time which could be established by the State was that it was run until they felt it was insufficient and there he had no memory of when it was actually to shut down (T.p.119,l.12-21). While the State introduced a North Carolina checking station plan.(R.p.24-27) it is clear from the

testimony that this was not a Highway Patrol checking station but an Eastern Band Tribal checking station and that it has to be viewed under Indian law to determine the validity of that checking station.

The Eastern Band have adopted the NC Motor Vehicle Laws and applied them to the Reservation. Cherokee Tribal Council by Tribal Code adopted N.C. Chapter 20 and all amendments thereto as the Motor Vehicle Law of the Reservation. Cherokee Code §20-1 reads as follows:

> (a) in order to insure consistency in the application and enforcement of all civil and criminal traffic motor vehicle laws on the Cherokee Indian Reservation and in surrounding areas, the Tribe adopts Chapter 20 of the North Carolina General Statutes and any amendment to that Chapter which may be made in the future . . .” (Ordinance Number 287; (7-17-2000).

If this Court concludes the State Court had jurisdiction it must still review the standards applied by the Eastern Band to the road block on the night of 24 April 2010. Since the road block was organized by the Cherokee Police Department, this Court must look to the applicability of the Federal Indian Civil Rights Act.

The law to be applied is not the Bill of Rights of the United States Constitution but the requirements imposed by Congress through the Indian Civil Rights Act of 1968 which determines the applicability of those enumerated rights created within an Indian Country since the Bill of Rights does not otherwise apply to non-

Indian or Indians within the Reservation. See *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed. 2d 106 (1978). The Indian Civil Rights Act of 1968 imposed by Congress the applicability of certain protections from the Bill of Rights within this Act as follows: 25 U.S.C. §1302:

> (a)In General. No Indian Tribe in exercising powers of self-government shall-- 2) violate the rights of people to be secure in their persons, homes, papers and effect against unreasonable searches and seizures, nor issue warrants upon probable cause supported by oath or affirmation and particularly describing the place to be searched and person or things to be searched or to be seized.

This Act stands for the proposition that the Constitutional protection of the Fourth Amendment applies to the Appellant in this action. The Court in *Bressi v. Ford,* 575 Fed. 3d 891 (2009) sets out the analysis of roadblocks in the event this Court should hold that State Court has jurisdiction. In *Ford*, the Indian Police Department was authorized to enforce State law under the adoption of the Tribal Code, however, while the Ninth Circuit failed to analyze the impact of the Indian Civil Rights Act as it relates to the arrest of a non-Indian, it did analyze the effect of an Indian road block when the Tribe is authorized to enforce State law. By analogy the application of North Carolina State law shall apply to the adoption of that law by the Tribe. In *Bressi*, the Court held that such a roadblock must meet the Constitutional requirements set out by the U.S. Supreme Court for such suspicionless stops.

In the present case this Court should apply the road block requirements set forth in the N.C.G.S. §20-16.3(a) as adopted by the Tribal Council, and the standard to be applied by the Indian Police. The Appellant's position is that the Indian police failed to provide the Constitutional protection safeguarded by the North Carolina State Courts as defined in *State v. Rose,* 170 N.C. App. 284, 612 S.E.2d 336 (2005) and its prodigy where subsequent decisions interpreted road blocks.

To be considered Constitutional, the North Carolina Courts have required that the Trial Judge examine the available evidence to determine the primary programmatic purpose of the check point program. See *State vs. Rose*. The United States Supreme Court in *City of Indianapolis v. Edmond,* 531 U.S. 32, 121 S.Ct. 447, 148 (2000) has required that the primary programmatic purpose be ascertained by a Trial Court. Id at 46. The United States Supreme Court stressed that a trial court may not simply accept a State's vocation of a proper purpose but instead "carry out a close review of the scheme at issue". See *Ferguson v. City of Charleston,* 532 U.S. 67, 121 S.Ct. 1281 (2001). That Court went on to hold that a trial court must "consider all available evidence in order to determine the relevant primary programmatic purpose." *Id* at 81. In the present case the Trial Court must in its order related to the motion to suppress the stop and subsequent arrest, find adequate and supportable evidence to conclude that the limited

intrusion into the Appellant's rights were proper. In *Edmond,* the Court held that a Trial Court could not avoid making a determination of the primary programmatic purpose simply by finding that a check point had at least one lawful purpose such as keeping impaired drivers off the road. This would allow the police to establish check points for virtually any purpose so long as they included a license or sobriety check point. *Edmond at* 46.

There can be no impermissible purpose of general law enforcement and the State must establish that for the road check its programmatic level as set forth in the words of *Edmonds*. In a close review of the testimony of both Line Srgt. Norville of the NC Highway Patrol and Srgt. Teesateskie, they never unequivocally pointed to a primary programmatic purpose that would qualify under *Edmonds* except for the fact that they did it because it was a "Harley Rally in Cherokee" and they "wanted to protect the public". (T.p.88,l.24; T.p89,l.1-16; T.p.111,l.16 – 23; T.p.112,l.22–T.p.113,l.1). In order to find a programmatic purpose a check point must be a narrow exception to the prohibition against suspicionless stops and not one for general crime control purposes. *U.S. v. Lidster*, 540 U.S. 419, 124 S.Ct. 885 (2004).

If the Court should conclude there was a Constitutional programmatic purpose, then the Court must take the next step in seeking an analysis of the reasonableness of the check point. In *Brown vs. Texas* 443 U.S. 47, 99 S.Ct. 2637 (1979) the Court stated

that the reasonableness of seizures under a road block must be less intrusive than a traditional arrest and must be balanced between the public interest and the individual's right to personal security free from arbitrary interference by law enforcement officers. In *Lidster* the Court reaffirming the standard of *Brown*, required a three part test for determining the reasonableness which must be reviewed and passed upon by the Trial Court. The first factor for the Court's consideration is the gravity of the public concern served by the seizure. In *Lidster* the Supreme Court found that the relevant public concern was grave. In the present case there appears no information that would support any type of grave reason for the particular road block in this case. There was no investigation of any crime that resulted in human death and that there was no need for the police to obtain any additional information other than the fact that they wanted to stop every single Harley participant coming out of the Harley Rally for the purposes of determining, as the Trial Court concluded, "that the officers concerned about checking traffic with regard to the users and participants for that Rally would probably certainly be justified and that the Court can almost take judicial notice of the fact that at a Harley Davidson Rally they are not singing hymns".(T.p.148,l.11-13). The Court further held that these were random check points, but according to the testimony of Officer Teesateskie the road checks were located at the areas where people

were coming out of the Harley Rally at both ends of the rally and within a half a mile apart.(T.p.110,l.12-19). In considering the second factor, the degree to which the seizure advances public interest the police must appropriately tailor their check points to meet important criminal investigatory needs. In *Lidster* the policy pointed out that the need to determine whether this advanced the public need was because there had been a hit and run within the same area of the road block and they set it up near the location of the accident. In the present case, the only thing that the Cherokee police were doing at this scene was blocking both exists of the Harley Rally for the purposes as the Court said checking the "users within the Rally". The Court further found that the two check points were "random" and found that they "don't do it regularly at either one of these places".(T.p.148,l.13-16). It is clear that these roadblocks were for more than just an investigation of violations of Chapter 20 but were established as general law enforcement for a general crime control purposes which *Edmond* found to be presumptively unconstitutional. A close review of the request by Chief Ben Reed of the Cherokee Police Department, establishes that they wanted to address issues that arose around the Rally as set forth in his letter of request. Chief Reed had the Western North Carolina Gang Task Force at the briefing regarding outlaw motorcycle gangs and recent biker gang activity.(R.p.23).

The evidence at the Trial level concerning the programmatic purpose and the reasonableness of the plan and the three factors to be considered under the *Brown* decision was that the State established there: was a plan which nobody had; no time-frame as to when it was scheduled to start and stop; no direction from anyone written or oral about how their conduct was to be established other than they were to have a patrol car there with the Cherokee Officers and a supervisor; if a driver was suspected of D.W.I., turn him or her over to the N.C Highway Patrol; and recall the briefing of the task force. This check point went well beyond the scope of just checking license and registration. The testimony of Line Srgt. Norville clearly establishes that it was a "general effort to try to catch all crimes" (T.p.88,l.24-T.p.89,l.1) and was therefore on its face a violation of the United States Constitution and Article IV, Unreasonable Search and Seizures as applied under the Federal Indian Civil Rights Act.

IV. The Trial Court erred in concluding that the North Carolina Highway Patrol Officer had authority to arrest the Defendant for an impaired driving offense.

While the NC Highway Patrol by its statutory authority has authority upon the highways within the State of North Carolina, that authority must be viewed in light of the Federal enclave laws which preclude State law enforcement authority on Federal lands

without cross-deputation or oaths from Federal agencies swearing law enforcement officers within the Federal system. This issue turns as well on the jurisdictional importance of the separation between State and Federal authority. An individual officer must have jurisdictional authority to make an arrest or otherwise he would be acting as a private citizen. The State of North Carolina put on no evidence which supported that the State Highway Patrol arresting officer had any jurisdictional authorization from the Department of Interior or was a sworn Indian officer for purposes of enforcing Tribal or Federal law within the Reservation. Since arrest authority relates to this officer's right to arrest a non-Indian on a Tribal road this case is one of first impression in the State of North Carolina. However, a review of other jurisdictions should stand for the authority that this State Highway Patrol officer has no authority to arrest this Defendant under the circumstances presented as of 24 April 2010. In *U.S. v. Anderson*, 857 F.Supp. 52 (1994), a Sioux Indian was convicted in State Court of aggravated assault and was paroled by the State of South Dakota. The Defendant and a South Dakota parole officer entered into a parole agreement which authorized the parole agent to engage in warrantless searches at the Defendant's home or his employment site and agreed not to consume any alcoholic beverages. The parole officer, a State employee, received information that the Defendant was drinking alcohol while on parole. The officer

went to the Defendant's home on the Sioux Reservation and found a loaded firearm and a bottle of whiskey in the kitchen cabinet. The Defendant did not argue that parole officers did not have a reasonable belief that it is necessary to execute searches while in the performances of their duty, his only contention was that a State officer has no authority to exercise criminal jurisdiction within Indian Country. See *Rosebud Sioux Tribe v. South Dakota,* 900 F.2d 1164 (1990) and *State v. Spotted Horse*, 462 N.W. 2d 463 (1990). The Court in *Anderson* held that the South Dakota State officers had no other position other than that of a private citizen when they were operating within Indian Country. The Federal Court granted the Defendant's motion to suppress the Federal indictment for violation of 18 U.S.C. §922(g) on the basis that the State officer's search of the Defendant's home was unconstitutional. The holding of *Anderson* should apply to the case before this Court, because this officer was a State Trooper neither deputized as a Cherokee Officer nor authorized as a Federal officer by the Bureau of Indian Affairs. He was a State Trooper conducting an assignment within the Federal enclave and was acting in no other capacity other than a private citizen. The Defendant was not arrested or otherwise in custody but was approached initially by the State Highway Patrol Trooper at the request of the Indian Police and initiated his investigation which led to the arrest. It is clear from the holding of the *Anderson* case that a State agency lacks

authority under the criminal jurisdiction to conduct a warrantless arrest. Even a consent by *Anderson* to allow a search of his home cannot alter the fundamental jurisdictional principles that a State agent has no authority other than as a private citizen once they are in Indian Country.

V. The Trial Court erred in failing to grant the Defendant's *Knoll* Motion to Dismiss the citation for violation of the Defendant's procedural and Constitutional rights.

After N.C Highway Patrol Officer took the Defendant to the Swain County Jail for an intoxilyzer the results of the test were concluded at 12:34 a.m. on 25 April 2010. The Defendant was then placed in the Swain County Jail. The Magistrate met with the officer and prepared his paperwork prior to the Defendant's initial appearance before him at 1:05 a.m. (T.p.176). At that time the Magistrate had already concluded that the Defendant would be held in jail until he had posted a secure bond prior to meeting with the Defendant. The alcohol results indicated to the Magistrate that the Defendant was pretty impaired.(T.p.177,l.7-12). Since the Defendant was already in custody of the Swain County Jail the Magistrate went over the paperwork he had prepared and explained the meaning of that paperwork.(T.p.177,l.18-25). The Magistrate told the Defendant he would be allowed to use a phone in the jail and that he was entitled to an additional chemical test but

provided him no information as to how he could secure that test other than that the jail would arrange the use of the telephone.(T.p.178-179,l.23). The only reason the Magistrate kept the Defendant in custody was because the Defendant was from out of state with no ties to the local community (T.p.180,l.6-16) and he had a firearm in his possession that this showed that the Magistrate felt that the Defendant was in further violation of North Carolina law. In fact Defendant had a concealed carry permit and that permit was on the Defendant's person and the gun was located in the console of his truck at the time it was seized. (T.p.202,l.5-10). The Magistrate made no findings as required by N.C.G.S. §15A-511 and §15A-534 as to any findings of fact which would lead to the Magistrate incarcerating the Defendant.(T.p.181,l.16-21). The Magistrate made no inquiry if the Defendant had any money with him or had any kind of credit cards with which he could provide security for release. (T.p.183,l.17-19). However, at the time he was committing the Defendant he believed that the Defendant was a really friendly fellow and seemed like a nice guy.(T.p.183,l.23-25). The Magistrate and Defendant talked and had a brief conversation which was very cordial and courteous to the Magistrate. (T.p.184,l.4-10). It appears that he was released from custody by the posting of a bail bond and the bail bond person removing him from the jail at approximately 4:50 a.m. on the morning of 25 April 2010.

When the Defendant was arrested he refused to sign the rights of the person requesting to submit to a chemical analysis because he did not trust breathalyzers and that there were many factors which would cause them to be flawed and that he would prefer a blood test.(T.p.197). He was told by the Trooper that a blood test would not be an option and if the Defendant did not blow he would lose his license.(T.p.197,l.16-21). The Defendant explained that the reason he was unable to contact anyone was because he did not know anyone in Swain County and that his wife could not drive his motorcycle and that his truck had been impounded and that she had been drinking so there was no way for him to call her to come obtain his release from jail. (T.p.198,l.1-9). The Defendant further said that the Magistrate asked if he had anyone who could come down and see him at the jail and he told him that he had no one that he was here from South Carolina with his wife and there was no one up here for him to call.(T.p.199). However, the Defendant said that at the time he was ordered to the jail that he had money and credit cards and he desired to obtain a blood test and that he would have obtained a blood test because he was not impaired. He further stated that if he had been released from custody he would have obtained a blood test by going to the hospital and that he had the money and credit cards to pay for a cab and to have the blood test performed. However, once the Defendant was able to get the bail bonds person to appear and

obtain his release it was already several hours after his arrest and he did not ask for her to take him to the hospital because of the expiration of the time from his arrest up to his release.(R.p.201).

It is clear from the statements of the Magistrate that the Defendant was a cordial, non-violent individual who was able to carry on a conversation with the Magistrate and to discuss with the Magistrate where the Magistrate lived when he was in South Carolina. There is no finding that he was a threat to himself or to others. The Magistrate made no findings as to why he required that the Defendant be incarcerated with a specific secured bond before he could be released as required under N.C.G.S. §15A-534(b). It is clear that the Defendant was not adequately apprised and afforded an opportunity to seek and receive an additional test while he was confined in jail. The only thing that the Magistrate made available to the Defendant was that the jail staff would let him use a telephone and to contact anyone he wanted.(T.p.192,l.9-12). Upon Defendant's request for a second chemical test, the State did nothing to assist the Defendant while in custody to obtain access to an additional test as required under N.C.G.S. §20-139.1. The State's failure to afford the Defendant the right to additional tests when he had monies available to do so constitutes a substantial breach of the statutory rights afforded him under N.C.G.S. §20-139.1 and as such gives rise to the Defendant's denial

of his right to protect and preserve evidence which comes at a critical period to provide an opportunity to challenge the claim of accuracy of the alcohol testing device. There should not be a different standard for a Defendant accused of a driving while impaired crime in North Carolina if he is out of state than a Defendant accused of the same crime if he is a resident of the State of North Carolina. When Defendants find themselves in circumstances where they have no opportunity to have friends and family observe them and form opinions of their impairment, the right to be able to have a subsequent test is a more fundamental opportunity to gather evidence and to secure independent proof of sobriety particularly because no friend or family would be available to attest to their opinions of sobriety. The gravamen of subparagraph (d) requires that the State afford assistance when so requested and the Defendant should be accommodated. This critical period of time to prepare a Defendant's defense to overcome the assumption of the accuracy of a blood test, is greater to an out of state individual who has no connections to the community than a local individual who has friends and family who can be contacted to form such an opinion of sobriety. There is a substantial breach of the Defendant's rights to protect and preserve his evidence and provide a defense and such lost opportunities constitute prejudice to the Defendant in this action. See *State vs. Knoll,* 322 N.C. 535, 369 S.E.2d 558 (1988).

CONCLUSION

For the foregoing reasons the Court of Appeals should reverse the Trial Courts orders denying Defendant's pretrial Motions to Dismiss and should remand with instructions to dismiss the charge.

Respectfully submitted this the 22nd day of September, 2013.

McLean Law Firm, P.A.

Electronically submitted

/s/ Russell L. McLean, III

Russell L. McLean, III
Post Office Box 4
Waynesville, NC 28786
NC State Bar No.: 7220
Tel: (828) 452-2896
Fax: (828)367-6517

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on counsel for the Appellee by depositing a copy, contained in a first-class postage pre-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

Mr. Neil Dalton
Special Deputy Attorney General
N.C. Department of Justice
Motor vehicle Section
Post Office Box 629
Raleigh, North Carolina 27602

This the 22nd day of September, 2013.

/s/ Russell L. McLean, III
Russell L. McLean, III