194 Misc.2d 347, 754 N.Y.S.2d 826, 2002 N.Y. Slip Op. 22758

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City Court, City of Oneida.
PEOPLE of the State of New York,
v.
Clinton R. HILL, Defendant.
Dec. 10, 2002.

After defendant, a Native American charged with second-degree harassment, was acquitted of related charges in tribal court, he moved to dismiss state prosecution on double jeopardy grounds. The City Court, City of Oneida, Anthony P. Eppolito, J., held that (1) state court would not sit in review of actions of Oneida Nation Tribal Court, and (2) as a matter of first impression, Oneida Nation Tribal Court was not a court of the state or any jurisdiction in the United States.
Ordered accordingly.

West Headnotes

[1] KeyCite Notes

209 Indians
209k32 Jurisdiction and Government of Indian Country and Reservations
209k32(13) k. Offenses; Enforcement; Extradition. Most Cited Cases

When a tribe criminally punishes a tribal member for violating tribal law, the tribe acts as an independent sovereign and not as an arm of the government, and therefore a federal prosecution does not bar prosecution by a separate sovereign and vice versa.

[2] KeyCite Notes

106 Courts
106VII Concurrent and Conflicting Jurisdiction
106VII(B) State Courts and United States Courts
106k489 Exclusive or Concurrent Jurisdiction
106k489(1) k. In General. Most Cited Cases

209 Indians KeyCite Notes
209k32 Jurisdiction and Government of Indian Country and Reservations
209k32(4) Tribal Laws and Government
209k32(7) k. Tribal or Indian Courts. Most Cited Cases

A federally recognized Indian tribe has authority to constitute its own Court and assert concurrent jurisdiction with state courts.

[3] KeyCite Notes

209 Indians
209k36 k. Crimes in Indian Country or Reservations. Most Cited Cases

New York has jurisdiction to try Native Americans for all crimes committed on Indian reservations.

[4] KeyCite Notes

209 Indians
209k38 Criminal Prosecutions
209k38(6) k. Review. Most Cited Cases

New York court prosecuting Oneida Indian for crime allegedly committed on Oneida lands would not sit in review of actions of Oneida Nation Tribal Court and hold hearing on alleged improprieties in tribal court proceeding in which charges arising out of same incident were disposed of by order of acquittal.

[5] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.1 k. Knowledge of Legislature. Most Cited Cases

361 Statutes KeyCite Notes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k230 k. Amendatory and Amended Acts. Most Cited Cases

The legislature, when enacting an amendment or new legislation, is presumed to know or be aware of the law existing at that time and not to act in a vacuum.

[6] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k212 Presumptions to Aid Construction
361k212.5 k. Intention to Change Law. Most Cited Cases

Any intention to change a well-established interpretation of a statute must emanate from the legislature and may not be imputed to the legislature in the absence of a clear manifestation of such intent.

[7] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k183 k. Spirit or Letter of Law. Most Cited Cases

361 Statutes KeyCite Notes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k180 Intention of Legislature
361k184 k. Policy and Purpose of Act. Most Cited Cases

361 Statutes KeyCite Notes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k217.2 k. Legislative History of Act. Most Cited Cases

Statutory construction will generally entail inquiry into the spirit and purpose of the statute, which requires examination of the statutory content of the provision as well as its legislative history.

[8] KeyCite Notes

135H Double Jeopardy
135HV Offenses, Elements, and Issues Foreclosed
135HV(C) Identity of Parties
135Hk183 Offenses Against Different Sovereignties or Governmental Units
135Hk183.1 k. In General. Most Cited Cases

209 Indians KeyCite Notes
209k38 Criminal Prosecutions
209k38(2) k. Jurisdiction. Most Cited Cases

Oneida Nation Tribal Court, in which Native American defendant was acquitted of crime allegedly committed on reservation, was not a court of any jurisdiction "within the United States," and therefore state court prosecution of defendant on charges arising out of same incident did not violate state double jeopardy statute. McKinney's CPL §§ 40.20, 40.30.

***827 *347** Robert J. Anello and Gerald H. Taylor for defendant.
Donald F. Cerio, Jr., District Attorney (Melissa Countryman Stearns of counsel), for plaintiff.

ANTHONY P. EPPOLITO, J.
The defendant, Clinton R. Hill, is charged with Harassment ***348** in the Second Degree

pursuant to Section 240.26(1) of the Penal Law alleging that on July 7, 2002, the defendant, an Oneida Indian, did intentionally subject Diane Schenandoah, also an Oneida Indian, to physical contact by slamming into her with his stomach several times, moving her backward several feet, backing her up into her mother, Maisie Schenandoah, causing the elder Ms. Schenandoah to fall. The facts alleged occurred within the recognized territory of the Oneida Nation of New York. A Criminal Summons was issued by this Court on July 11, 2002, and the defendant appeared with counsel at Court on July 19, 2002, ***828** wherein a not guilty plea was entered and defense counsel requested an adjournment of proceedings to August 15, 2002 so that trial counsel and co-counsel could be afforded the opportunity to file pre-trial motions and appear in support thereof. On August 7, 2002, defense counsel filed omnibus motions with this Court dated August 3 and 5, 2002 and made returnable at the August 15, 2002 motion date.

On August 13, 2002, a supplemental affidavit and motion were received from defense counsel advising that the defendant had appeared before the Oneida Nation Tribal Court on July 30, 2002 on charges of Assault in the 3rd degree, Harassment in the 2nd degree, and Disorderly Conduct in violation of applicable sections of the Oneida Nation Penal Law. Upon arraignment at tribal court, the defendant pled not guilty and requested a jury trial. A tribal court jury trial was then scheduled for August 7, 2002. A jury was impaneled and on August 8, 2002, the prosecution rested after the alleged victim and her mother refused to comply with a subpoena issued by the tribal court. The charges of Assault and Harassment were disposed of by an order of acquittal. The disorderly conduct charge was adjourned in contemplation of dismissal.

Thereafter, the defendant presented the supplemental motion to dismiss on the basis that the defendant would otherwise be placed in double jeopardy pursuant to Article I, Section 6 of the New York State Constitution and N.Y. Criminal Procedure Law Sections 40.20 and 40.30.

Because defendant's other motions would be rendered academic depending on the determination of the double jeopardy issue, that matter will be addressed first.

At the Federal level, it has been decided that a tribal court criminal prosecution does not preclude subsequent federal prosecution and that the concept of “dual sovereignty” is applicable ***349** in such a scenario *U.S. v. Wheeler,* 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). The notion of tribal sovereignty as defined by the Court in *Wheeler,* described sovereignty of a unique and limited character, existing only at the sufferance of Congress and being subject to a complete defeasance, should Congress so act. The tribes however possess aspects of sovereignty not withdrawn by treaty or statute as an element of retained tribal sovereignty.

[1] When a tribe criminally punishes a tribal member for violating tribal law, the tribe acts as an independent sovereign and not as an arm of the government. *Wheeler, supra* at page 98 S.Ct. at 1080, and accordingly, a federal prosecution does not bar prosecution by a separate sovereign and vice versa. See *Bartkus v. Illinois,* 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 and *Abbate v. U.S.,* 359 U.S. 187, 79 S. Ct. 666, 3 L.Ed.2d 729.

The nature of sovereignty, limited sovereignty and/or dependent status has been the subject of numerous commentaries and analyses. Recent discussions of sovereignty explicitly state that a tribe or tribal court is not an instrumentality or arm of the United States government (See *U.S. v. Archambault,* 206 F.Supp.2d 1010 (D.C.S.D.2002)). That Court cites *Wheeler* and the *Handbook of Federal Indian Law,* F. Cohen, 1945 “that tribal sovereignty and self government are only restricted if the federal government extinguishes those rights and that inherent powers of a limited sovereignty have not been extinguished.” See *Archambault* at page 1015 for a discussion of congressional intent discussing at length the clarification of the status of tribes as “domestic independent nations” H.R. Report No. 61, 102d Cong., 1st Session 7 (1991) U.S. Code Cong. & Admin. News 1991 pp. 370, 376-377. ***829** These commentaries are useful in discussing and determining the central question presented hereafter.

[2] There is no fundamental question that New York has jurisdiction to try Indians for crimes committed on Indian reservation lands. This power was granted the state by Congress in 1948 by the enactment of 25 USC § 232. There is also no fundamental question whether a federally recognized New York tribe has the authority to constitute its own Court and assert concurrent jurisdiction with the state courts. See for instance *People v. Edwards*, 78 A.D.2d 582, 432 N.Y.S.2d 567 (4th Dept.1980).
In *People v. Boots*, 106 Misc.2d 522, 434 N.Y.S.2d 850 (1980), the Court held in fact that the federal enactment of 25 USC § 232 specifically ceded criminal jurisdiction to New York and while some dissent has been registered at federal level (See *U.S. v. Cook*, 922 F.2d 1026, cert. denied), ***350** it is clear that there is no federal preemption and that tribes possess concurrent jurisdiction with New York State over criminal matters arising between tribal members on Indian land. *Boots, supra* at 531, 434 N.Y.S.2d 850.

[3] *Boots, supra,* also sets forth a well-considered rejection of the defendant's current argument that 18 USC 1153 (the Federal Major Crimes Act), preempts 25 USC § 232. This Court adopts the rationale of the *Boots, supra* and *Edwards, supra* decisions expressly ruling that New York does have jurisdiction to try Indians for all crimes committed on Indian reservations, and agrees with the analysis and commentaries of the legislative history set forth by the Court at *Boots, supra* pages 537-538, 434 N.Y.S.2d 850.
The defense position for dismissal rests squarely on the language set forth at N.Y. CPL 40.30 which states in pertinent part that a person is "prosecuted for an offense within the meaning of Section 40.20, when he is charged by an accusatory instrument filed in *a Court of this State or of any jurisdiction within the United States* (emphasis supplied) and under the action either:
a) Terminates in a conviction upon a plea of guilty; or
b) Proceeds to trial stage and a jury having been impaneled and sworn
....
Clearly, New York's double jeopardy protections are significantly broader than the Federal counterpart. See *People v. Abbamonte*, 43 N.Y.2d 74, 400 N.Y.S.2d 766, 371 N.E.2d 485 (1977) and *People v. Lennon*, 80 A.D.2d 672, 436 N.Y.S.2d 385 (Third Dept.1981) and McKinney Practice Commentaries, Article 40, Sections 40.10, 40.20 et seq.
Defendant maintains that there can be no dispute that the Oneida Nation Tribal Court constitutes a court of "any jurisdiction within the United States," and cites at least two decisions from other jurisdictions. *People v. Morgan*, 785 P.2d 1294 (Colo.S.Ct.1990) and *Booth v. Alaska*, 903 P.2d 1079 (1995) in support of that position.
The People maintain that Indian Tribal Courts do not fall within the language of CPL § 40.30 suggesting that same is contrary to the intent of the enabling legislation at 25 USC § 232; contrary to concepts of quasi-sovereignty; that the offenses charged are not identical in that the offenses involved "death, injury, loss of consciousness to a different victim."; that the defendant "procured prosecution" and in doing so fell within an exception of the double jeopardy provisions of the statute citing ***351** *People v. Snyder*, 99 A.D.2d 83, 471 N.Y.S.2d 430 (4th Dept.1984) and ****830** *People v. Antonelli*, 250 A.D.2d 999, 673 N.Y.S.2d 479 (3rd Dept.1998). Finally, the People assert suggestions of impropriety in the tribal court proceeding and have requested a hearing or inquest in this regard. This final application has resulted in the submission of numerous assertions of fact of dubious evidentiary merit from both sides as to the nature of those proceedings.

[4] As this Court has no jurisdiction to review the proceedings of a Court of a "separate sovereign," the Court must reject the application of the People to sit in review of the actions of the Tribal Court and the People's request for a hearing in that regard is denied. Further the "procurement" argument of the People is wholly inapplicable to the instant matter. The procurement cases such as *Snyder*, *Antonelli*, and *People v. Dishaw*

54 A.D.2d 1122, 388 N.Y.S.2d 795 (4th Dept 1976) reflect scenarios wherein a defendant took advantage by pleading to a lesser offense than could have been charged without the knowledge of the appropriate prosecution, for the purpose of avoiding prosecution for a greater offense. Neither does the "sham prosecution" exception to the dual sovereignty rule have any applicability to this case. The "sham prosecution" exception is designed to address and rectify a situation wherein one sovereign did not act of its own volition due to the domination, control, or manipulation of the other to the extent that it did not act on its own and was merely a tool of the other sovereign. See for instance, *U.S. v. Holland*, 985 F.Supp. 587 (D.C.Md.1997) and *U.S. v. Stokes*, 947 F.Supp. 546 (D.C.Mass.1996).

The issue of whether the Oneida Nation Tribal Court is a court "of this state or any jurisdiction within the United States"CPL 40.30(1) is indeed a matter of first impression in this state. Certainly, the legislation establishing peacemaker courts anticipated by Indian Law § 46 is not the source of the Oneida Nation Tribal Courts creation. It is undisputed that the New York Oneida Tribal Court was established in 1997 by virtue of a Nation Ordinance, and by virtue of the tribe's vestigal sovereignty as described in *Wheeler.*

The Criminal Procedure Law does not provide definitions for the key word or key phrase in the statute. In this case, common sense would seem to identify that the Oneida Indian Nation is in fact a "jurisdiction." The problem arises whether this jurisdiction is one "within the United States" and how the aspects of residual sovereignty as defined by the Supreme Court in *Wheeler* affect this question.

***352** It is clear that under *Wheeler, supra* at page 318, 98 S.Ct. 1079 that Tribal Courts are not arms of the federal government, nor is the Oneida Nation Tribal Court an arm of the New York government.

The current statutory scheme of Criminal Procedure Law Article 40 was enacted in 1970. The statutory language appears as early as December 1966 in a tentative draft of the State Commission on Review of the Penal Law and Criminal Code, p. 26 (then proposed CPL Art. 30.10). There is no comment whatsoever in the draft relative to the issue and there is actually no discussion given the dual sovereignty issue in the legislative history.

The Courts of this state have addressed the definitional question once. In *Booth v. Clary*, 83 N.Y.2d 675, 613 N.Y.S.2d 110, 635 N.E.2d 279 (1994) when presented with question whether a U.S. military tribunal was a court of "any jurisdiction with the United States," the Court of Appeals answered in the affirmative. The rationale set forth in *Booth, supra*, derived from prior precedent that determined that a court martial adjudication could be substituted for a predicate felony. See ***831** *People v. Benjamin*, 22 N.Y. 2nd 723, 292 N.Y.S.2d 110, 239 N.E.2d 206; and that a military court martial was the equivalent of a Federal District Court trial. *U.S. v. Walker*, 552 F.2d 566, and ultimately its authority was constitutional (Art. I, U.S.Constitution). *Booth* provides no other criteria applicable to the instant matter.

A review of the legislative history of 25 USC § 232 passed in 1948 which conferred jurisdiction upon New York State over offenses committed on Indian reservations by or against Indians is somewhat more instructive. That legislation, was a product of State and Federal dialogue over the need of the State to protect Indians for crimes perpetrated by or against Indians and to assure that law and order be established on reservations when tribal laws had broken down.

The bill was intended to establish a uniformity of jurisdiction within New York to be used to enforce the law when deemed proper and necessary by State officials and when law enforcement by Indian Courts was deemed unsatisfactory. The legislative history of the federal transfer of jurisdiction to New York at pages 2284 through 2287 while containing no explicit reference to the double jeopardy question, offers no presumption that a tribal court determination would bind New York authorities and, indeed, specifically leaves with State officials the discretion to prosecute when enforcement by Indian courts was deemed unsatisfactory. At least in the context of affairs***353** between Indian tribes and the State as it existed over 50 years ago, it appears that the intention of both the Federal and State Legislatures was to leave prosecutors the discretion to pursue prosecution regardless of the determination of tribal courts. (See resolution of New York State

Senate, March 23, 1945 and report of Secretary of the Interior, March 1, 1948).

[5] [6] [7] The provisions of CPL 40.30 enacted in 1970 predate the existence of the Oneida Nation Tribal Court by 27 years. A fundamental rule of statutory construction is that the legislation, when enacting an amendment or new legislation, is presumed to know or be aware of the law existing at that time and does not act in a vacuum. *People v. Ney*, 191 Misc.2d 185, 742 N.Y.S.2d 506 (New York City Criminal Court 2002). Any intention to change a well-established interpretation of the statute must emanate from the legislature and may not be imputed to the legislature in the absence of a clear manifestation of such intent. *Knight-Ridder Broadcasting Inc. v. Greenberg*, 70 N.Y.2d 151, 518 N.Y.S.2d 595, 511 N.E.2d 1116 (1987). Statutory construction will generally entail inquiry into the spirit and purpose of this statute which requires examination of the statutory content of the provision as well as its legislative history. *Sutka v. Conners*, 73 N.Y.2d 395, 541 N.Y.S.2d 191, 538 N.E.2d 1012 (1989).

The rule of construction charging to the State legislature knowledge of the law existing at the time of enactment requires this Court to put the enactment of 25 USC § 232 and Article 40 of the Criminal Procedure Law into proper historical context. At the time of passage, the New York State Court of Appeals in *People ex rel. Cusick v. Daly*, 212 N.Y. 183, 105 N.E. 1048, described Indian nations as " *quasi foreign nations* " and Indian reservations as " *quasi extra territorial.*" The Court of Appeals in *People ex rel. Ray v. Martin*, 294 N.Y. 61, at 71, 60 N.E.2d 541 (1945), held that Indian country was not land under jurisdiction of the United States, and that New York had the power of a sovereign over the person and property of Indian nations. These principles, whether still viable, stood as the expression of the law at the time the statutes were enacted. These principles taken and applied in historical ***832** context must serve as a guide to the legislative mind set at the time.

The aforesaid case law, considered in conjunction with the state and federal dialogue leading up to the passage of 25 USC § 232, and the absence of any manifest intent to include tribal courts in the legislative history of CPL Article 40, leads one to conclude that the state neither anticipated nor considered that Indian tribes were political entities "existing within the United States."

[8] ***354** Given the nature of tribal sovereignty, the phrase "jurisdiction within the United States" is ambiguous. The defense notion that tribal enclaves exist within the geographic perimeters of the 50 states and are therefore "a jurisdiction within the United States" suggests an overly simplistic analysis of the statutory language. Tribal enclaves are not subdivisions of state or federal government. They are separate political entities insofar as their internal government is concerned. These important aspects of vestigal sovereignty as identified by the Court in *Wheeler*, considered in light of the context of the legislative histories and the rules of statutory construction set forth above, lead this Court to conclude that it was not the intention of the State legislature in seeking the enactment of 25 USC § 232 or passage of CPL Article 40 to include tribal courts within the meaning of the statute. Accordingly, the doctrine of separate sovereigns does still apply in these proceedings. Absent specific direction by the State legislature, this Court believes to do otherwise would be an inappropriate exercise of discretion.

The Court, in reaching this conclusion, is wholly mindful of determinations from other jurisdictions. *People v. Morgan*, 785 P.2d 1294 (Colo.Sup.Ct.1990) which ruled that its state double jeopardy statute extended to prior tribal prosecution was decided based upon the Colorado Court's decision to broaden state legislation in the absence of legislative action. More significantly, the legislative history and discussion in Colorado is wholly dissimilar in context to the New York experience. The same might be said for *Booth v. Alaska, supra.* More persuasive to this Court is the rationale in *Queets Band of Indians v. Washington*, 102 Wash.2d 1, 682 P.2d 909 (1984) suggesting that if the state wishes to specifically extend certain statutory benefits to another sovereign entity it should do so specifically and not by implication.

The importance that the defense attaches to this issue is not lost on this Court, and it is notable that defendant would forego discovery requests and motion practice in tribal court, (where in fact a misdemeanor level assault charge had been lodged) in order to expedite its trial proceedings and be able to present the question of double jeopardy in time for the August 15th motion date.

Turning to the other motions of record, the Court grants the defense application for hearings pursuant to *Sandoval* and *Ventimiglia* to be conducted at the same time as an evidentiary hearing relative to the propriety of the search and the fruits ***355** thereof. The People are directed to provide material, if any, pursuant to *People v. Rosario; Brady v. Maryland* and *U.S. v. Agurs* as a continuing obligation. The other discovery applications relative to witnesses, arrest, and criminal records appear to have been complied with. The defense argument relative to justification as an affirmative defense is dependent upon evidentiary matters presented to the trier of fact and will not be determined upon submission of papers.

The factors set forth by defendant for a dismissal in the interests of justice are not ***833** so compelling as to persuade this Court that same would be appropriate at this stage. Nothing herein should be deemed to preclude the Court from reconsidering said application in the future should this record so dictate.

N.Y.City Ct.,2002.

People v. Hill

194 Misc.2d 347, 754 N.Y.S.2d 826, 2002 N.Y. Slip Op. 22758

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