SISSETON-WAHPETON OYATE

SUPREME COURT

SISSETON WAHPETON OYATE Plaintiff/Appellee, v. THOMAS ANDERSON JR., Defendant/Appellant.	NO. CR-15-988-688 MEMORANDUM OPINION AND ORDER

Per Curiam (Thor Hoyte, Chief Justice and Associate Justices Russel Zephier and Pat Donovan)

FACTS AND PROCEDURAL HISTORY

Thomas Anderson, Jr., appeals the denial of his motion to suppress. On August 17, 2015 the Sisseton-Wahpeton Oyate conducted drug testing of all Oyate employees after each employee signed a consent form consenting to a chemical test of their bodily fluids. It was Anderson's first day on the job as a temporary hire for the Tribal Fish and Wildlife Department. Anderson was one of several Oyate employees who tested positive for a controlled substance and were subsequently charged in Sisseton-Wahpeton Oyate Court with Ingestion. Anderson filed a Motion to suppress the drug test results that was denied by the Oyate Court. The Oyate court found the search and seizure was reasonable and Anderson's consent to search and seizure was voluntary. Anderson files an Interlocutory Appeal with this court challenging the legality of the drug testing that was performed.

ISSUES

Anderson raises the following issues on appeal:

1) Whether the Oyate court erred when it found the search and seizure of Anderson's bodily fluids for chemical analysis was reasonable;

2) Whether Anderson voluntarily consented to a search and seizure

DISCUSSION

The Oyate Court ruled that the drug test performed on Anderson was reasonable and his consent was voluntary. The Tribal Court using its own precedents held:

> ". . . the use of UA results obtained in the employment context can only be used in criminal proceedings if the results are obtained in compliance with the Indian Civil Rights Act, 25 U.S.C. §1302(a)(2). Because a chemical test of the blood or urine is a 'search' under the ICRA, it must be both 'reasonable' and done with a warrant unless an exception to the warrant requirement is demonstrated by the Oyate. In Oyate v. Marks this Court held that employment drug testing that does not comply with the personnel policies and procedures governing drug testing is unreasonable and violative (sic) of the Indian Civil Right Act."[1]

Neither party challenges the Tribal court's ruling that a chemical test of the blood or urine is a 'search' under the ICRA, it must be both 'reasonable' and done with a warrant unless an exception to the warrant requirement is demonstrated by the Oyate. We agree that this is the correct analysis and will employee the same analysis here.

A. Whether Oyate Court erred in finding that the search and seizure was reasonable?

In three of the five cases were defendants failed the drug test, the court found the testing was unreasonable because it the testing did not comply with the personnel policies and procedures governing drug testing and violated the Indian Civil Rights Act. The current Oyate personnel policies and procedures governing drug testing only allows drug testing of its employees in five

[1] 25 U.S.C. §1302(a)(2) of the Indian Civil Rights Act provides that no Indian tribe in exercising powers of selfgovernment shall violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizures, nor issue warrants , but upon probable cause , supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

(5) specific situations: 1) pre-employment; 2) mandatory annual; 3) reasonable suspicion exists; 4) randomly generated by computer; and 5) after a reportable accident.[1] None of these defendants fit any of these situations and the drug test results were suppressed and their cases dismissed.

In Anderson's case, he was a new hire and was required to submit to a drug test as a condition of his employment and the drug testing in his case complied with the Oyate's personnel policies and procedures governing drug testing. Therefore, Anderson was required to submit to drug testing under the Oyate's policies as a condition of his employment and the testing was reasonable in that regard. In fact, Anderson was scheduled for testing as a new hire before all Oyate employees were told to report for testing.

But the inquiry doesn't end here.

B. Whether Anderson voluntarily consented to a search and seizure?

Anderson argues that his consent was not voluntary. Anderson points out that the consent form he signed was not voluntary because the consent form advises that if Anderson refused the test he may be terminated from employment.

SWO Code allows a law enforcement officer to make a search without a warrant if the search and seizure is supported by probable cause (emphasis added) and when the person consents.[3] We need not decide whether Anderson's consent was voluntary because we find that law enforcement lacked probable cause to search without a warrant as required by SWO code. Nothing in the record to indicate that probable cause existed to search and seize Anderson's bodily fluids for drug testing. It is clear from the record that law enforcement had no

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[1] Chapter XI B.3. of the Sisseton-Wahpeton Oyate Personnel Policies

[3] SWO Code 23-04-05

particularized or individualized probable cause to believe Anderson had been ingesting illegal drugs. There was evidence that there may have been drug usage in the tribal building by either unknown employees or by unknown members of the public who have public access to the building. These facts do not rise to the level of probable cause.

The Oyate may perform drug testing in compliance with its drug testing policy as a condition of employment but may not use those results in a subsequent criminal prosecution unless it has probable cause to search and seize an employee's bodily fluids and an exception to the warrant requirement exists. This Court will recite the Oyate Court's ruling found in footnote 1 of its Orders on Suppression Motions: "Nothing in the orders entered herein should be construed as binding on any employment or civil matters involving these Defendants because the exclusionary rule only applies to criminal proceedings and as this Court [the Oyate court] noted in Oyate v. Kampeska, merely because criminal proceedings result in suppression of evidence does not dictate the evidence can be used in civil or employment matters."[2]

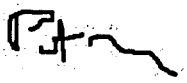
This case is remanded back to Oyate Court with instructions to enter an order suppressing the use of any evidence of drug testing and results performed on Anderson in this criminal prosecution.

IT IS SO ORDERED.

Dated this 26th day of April, 2016.

FOR THE COURT:

[2] Found in Footnote 1 of the Oyate's October 19, 2015 Orders on Suppression Motions



Pat Donovan Associate Justice