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PASSED

JUL 09 2020

CHEROKEE COUNCIL HOUSE
CHEROKEE, NORTH CAROLINA

Date: MAY 12 2020

ORDINANCE NO. 181 **(2020)**

Short Title: amends the Cherokee Controlled Substances Act to increase mandatory minimum sentences for violations of that Act and for violations of related crimes such as burglary, breaking or entering, and trespass.

WHEREAS, the number of people abusing and trafficking in controlled substances on Tribal trust land has increased dramatically; and

WHEREAS, this increase has been highlighted by a recent spike in fatal overdoses, mostly attributed to the abuse of heroin that has been mixed with other harmful chemicals or drugs, including fentanyl; and

WHEREAS, nearly every Cherokee family and every Tribal community has been adversely affected by the increase in drug abuse and trafficking, whether it's been through the overdose or death of a loved one, the incarceration of a relative or community member or the increase in thefts from area homes and businesses; and

WHEREAS, Tribal law should be amended to take a more aggressive approach to the problem, including increasing mandatory minimum periods of incarceration for violations of the Cherokee Controlled Substances Act and related crimes.

NOW THEREFORE BE IT ORDAINED by the Eastern Band of Cherokee Indians in Tribal Council assembled, at which a quorum is present, that the Cherokee Code shall be amended to read as follows:

Sec. 14-95.21. - Punishment levels.

The authorized punishment for each class of penalty is as specified below:

(a) Any person subject to a class A penalty shall be imprisoned in active custody for not less than ~~one-year~~ eighteen months nor more than three years and pay a fine of not less than $5,000.00 nor more than $15,000.00 and shall be subject to exclusion for a period of not less than ten years nor more than life. This punishment shall require a mandatory ~~one-year~~ eighteen months active sentence and the remainder of any sentence greater than the mandatory minimum may be suspended only if a condition of special probation is imposed to require the defendant to serve the remaining portion of a term greater than the mandatory ~~one-year~~ eighteen months, and the imprisonment may not be spent on electronic home confinement.

(b) Any person subject to a class B penalty shall be imprisoned in active custody for not less than ~~six months~~ one year nor more than three years and pay a fine of not less than $2,000.00, nor more than $15,000.00 and shall be subject to exclusion for a period of

not less than three years nor more than 15 years. This punishment shall require a mandatory ~~six-month~~ one year active sentence and the remainder of any sentence greater that the mandatory minimum may be suspended only if a condition of special probation is imposed to require the defendant to serve the remaining portion of a term greater than the mandatory ~~six months~~ one year.

(c) Any person subject to a class C penalty shall be imprisoned for not less than ~~30 days~~ six months nor more than one year and pay a fine of not less than $1,000.00, nor more than $5,000.00 and shall be subject to exclusion for a period of not more than ten years. This punishment shall require a mandatory ~~30-day~~ six months active sentence and the remainder of any sentence greater than the mandatory minimum may be suspended only if a condition of special probation is imposed to require the defendant to serve the remaining portion a term greater than the mandatory ~~30 days~~ six months.

(d) Any person subject to a Class D Penalty shall be imprisoned for not more than three months and pay a fine of not more than $5,000.00, perform 24 hours of community service and pay the costs of community service in the sum of $200.00, and shall be subject to exclusion for a period of not more than ten years.

(e) Any additional penalties required under Cherokee Law shall be imposed and the mandatory minimum fines shall be reduced appropriately to ensure any punishment imposed complies with the requirements of the Indian Civil Rights Act.

(f) ~~Except as provided in Section 14-95.35, 14-95.36 and 14-95.37, the court may not defer any penalty imposed for violation of this Article.~~ The court may stay a sentence imposed under subparagraph (c) above and transfer the case to the ~~Drug~~ Wellness Court~~, but only after the mandatory minimum 30-day sentence has been served~~ in accordance with Section 14-95.37[.] The court may not grant a Prayer for Judgment Continued for violations under this Article.

(g) The sentence of persons violating this article will be elevated under the provisions of Section 14-95.22, 14-95.23, and 14-95.24. Except as provided in 14-95.22(a)(v), if two or more elevating factors are found, then the person shall be subject to a class A penalty.

(h) Credit for inpatient treatment. The judge may order that a term of imprisonment imposed as a

condition of special probation under any level of punishment be served as an inpatient in a facility approved by the Tribe for the treatment of substance abuse where the defendant has been accepted for admission or commitment as an inpatient[.] ~~but only after the mandatory minimum sentence has been served.~~ The defendant shall bear the expense of any treatment. The judge may impose restrictions on the defendant's ability to leave the premises of the treatment facility and require that the defendant follow the rules of the treatment facility. The judge may credit against the active sentence imposed on a defendant the time the defendant was an inpatient at the treatment facility, provided such treatment occurred after the commission of the offense for which the defendant is being sentenced[.]~~, but only when such sentence is above the mandatory minimum active sentence required.~~ This section shall not be construed to limit the authority of the judge in sentencing under any other provisions of law.

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Sec. 14-95.31. - Procedure for determining elevating factors.

(a) *Generally, burden of proof.* The court shall consider evidence of elevating factors present in the offense that make an elevated sentence appropriate. The ~~state~~ Tribe bears the burden of proving beyond a reasonable doubt that an elevating factor exists.

(b) *Procedure for determination of prior record.* The existence of elevating factors under section 14-95.22 will be determined as provided in that section. The existence of other elevating factors will be determined in accordance with the procedures of this section.

(c) *Jury to determine elevating factors; jury procedure if trial bifurcated.* The defendant may admit to the existence of an elevating factor, and the factor so admitted shall be treated as though it were found by a jury pursuant to the procedures in this subsection. If the defendant does not so admit, only a jury may determine if an elevating factor is present in an offense. The jury impaneled for the trial of the offense may, in the same trial, also determine if one or more elevating factors is present, unless the court determines that the interests of justice require that a separate sentencing proceeding be used to make that determination. If the court determines that a separate proceeding is required, the proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of whether one or more elevating factors exist, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which the juror was selected. If the trial jury is unable to reconvene for a hearing on the issue of whether one or more elevating factors exist after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue. A jury selected to determine whether one or more elevating factors exist shall be selected in the same manner as juries are selected for the trial of criminal cases.

(d) *Procedure if defendant admits elevating factor only.* If the defendant admits that an elevating factor exists, but pleads not guilty to the underlying offense, a jury shall be impaneled to dispose of the offense charge. In that case, evidence that relates solely to the establishment of an elevating factor shall not be admitted in the trial.

(e) *Procedure if defendant pleads guilty to the offense only.* If the defendant pleads guilty to the offense, but contests the existence of one or more elevating factors, a jury shall be impaneled to determine if the elevating factor or factors exist.

(f) *Pleading of elevating factors.* Elevating factors set forth in this article need not be included in a complaint or other charging instrument.

(g) *Notice of intent to use elevating factors or prior record level points.* The ~~state~~ Tribe must provide a defendant with written notice of its intent to prove the existence of one or more elevating factors under this article at least 30 days before trial or the entry of a

guilty or no contest plea. A defendant may waive the right to receive such notice. The notice shall list all the elevating factors the ~~state~~ Tribe seeks to establish.

(h) *Written findings; when required.* The court shall make findings of the elevating factors present in the offense. If the jury finds elevating factors, the court shall ensure that those findings are entered in the court's judgment. Findings shall be in writing.

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Sec. 14-95.32. - Special evidence procedure.

(a) Notwithstanding any provision to the contrary in the North Carolina General Statutes as adopted herein, whenever a substance is submitted to either the North Carolina State Bureau of Investigations Laboratory, the Charlotte, North Carolina, Police Department Laboratory; the Toxicology Laboratory, Reynolds Health Center, Winston-Salem; the Forensic Testing Laboratory at Duke University Medical Center; or any other accredited laboratory testing facility, whether owned publicly or privately, approved by the Cherokee Court for chemical analysis, the report of that analysis shall be certified ~~upon a form approved by the Chief Justice of the Cherokee Court~~ by the person performing the analysis and shall be admissible as evidence without further authentication in all proceedings in the Cherokee Court as evidence of the identity, nature, and quantity of the substance analyzed provided that:

i. The Tribe notifies the defendant and files notice with the court at least 30 days before trial of its intention to introduce the certified report into evidence under this subsection and provides a copy of the certified report to the defendant, and

ii. The defendant fails to make a written objection to the admission of the certified report into evidence at least 15 days before the trial. Failure to make such a written objection shall be deemed a waiver of the defendant's right to confront the person performing the chemical analysis at trial.

(b) Nothing in subsection (a) precludes the right of any party to call any witness or to introduce any evidence supporting or contradicting the results contained in the certified report under subsection (a). The defendant shall have the right to confront the person performing the chemical analysis unless that right is waived in accordance with the procedures in subsection (a). However, if the defendant objects to the admission of the certified report in subsection (a) and if the defendant is found guilty of an offense under this section, the defendant will be responsible for all costs associated with obtaining the testimony of the person performing the chemical analysis.

(c) When a certified report under subsection (e) is sought to be admitted into evidence by the Tribe, a statement signed by each successive person in the chain of custody of the substance analyzed shall be required as evidence of the chain of custody of the substance analyzed. The statement shall indicate the date when the substance analyzed was in the custody and control of the persons whose signatures appear on the statement and that he/she delivered the substance analyzed to the next consecutive person whose signature appears on the statement. The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in the chain of custody and shall state that the material was delivered in essentially the same condition as

received. The statement may be placed on the same document as the certified report provided for in subsection (e) of this section. A statement under this subsection shall be prima facie evidence that the persons whose signatures appears on the statement had custody and control of the substance analyzed on the dates indicated on the statement and that those persons made delivery of the substance analyzed to the next consecutive person whose signature appear on the statement and it shall not be necessary to call each person whose signature appears on the statement to testify at trial in order to establish the chain of custody of the substance analyzed. The provisions of this subsection may be utilized by the Tribe only if:

i. The Tribe notifies the defendant at least 30 days before trial of its intention to introduce the statement into evidence under this subsection and provides defendant with a copy of the statement, and

ii. The defendant fails to file a written objection to the introduction of the statement into evidence at least 15 days before trial. Failure to make such a written objection shall be deemed a waiver of the defendant's right to confront the persons whose signatures are contained in the statement.

(d) Nothing in subsection (c) precludes the right of any party to call any witnesses or to introduce any evidence supporting or contradicting the chain of custody of the substance analyzed. The defendant shall have the right to confront all persons who had physical custody or control of the substance analyzed unless that right is waived in accordance with the procedures of subsection (c). However, if the defendant objects to the admission of the statement in subsection (c) and if the defendant is found guilty of an offense under this section, the defendant will be responsible for all costs associated with obtaining the testimony of the persons whose signatures appear in statement.

(e) When a person is subject to random drug testing as a result of a term of probation or electronic home confinement or provides a blood or urine sample under the provisions of Chapter 20 of the North Carolina General Statutes, scientific evidence demonstrating the possession of a controlled substance in the blood or urine of the person shall be admissible and shall constitute a rebuttable presumption of prima fascia evidence of willful possession of a controlled substance in violation of this article.

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Sec. 14-95.37. - Transfer to Cherokee ~~Tribal Drug~~ Wellness Court.

Upon the conviction of any offense under this article ~~under which the person would be subject to class C or D penalty, except for a conviction under 14-95.6(c) or 14-95.7(d),~~ the court may transfer the case to Cherokee ~~Tribal Drug~~ Wellness Court pursuant to the provisions of Chapter 7C. Upon unsuccessful discharge from the Wellness Court program and transfer back to the Cherokee Court, the Cherokee Court shall immediately activate the sentence or the balance of the sentence that was stayed including the collection of all outstanding fines, fees and costs, notwithstanding any term of imprisonment imposed by the Wellness Court. Payment of required fines shall be stayed until discharge from the Wellness Court.

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Sec. 14-10.9. - Criminal mischief to property.

A person is guilty of the crime of criminal mischief to property if he or she:

(1) Purposely or recklessly damages tangible personal property of another; or,

(2) In the employment of fire, explosives, or other dangerous means, negligently damages personal property of another; or

(3) Purposely or recklessly tampers with tangible personal property of another so as to endanger person or property; or

(4) Purposely or recklessly causes another to suffer pecuniary loss by deception or threat.

(5) Criminal mischief shall be punishable by a fine not to exceed five thousand dollars ($5,000.00), by a term of imprisonment not to exceed ~~six months~~ one year, or both.

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Sec. 14-10.15. - First degree trespass.

(a) Offense. A person commits the offense of first degree trespass if, without authorization, he enters or remains:

(1) On premises of another so enclosed or secured as to demonstrate clearly an intent to keep out intruders; or

(2) In a building of another.

(b) First degree trespass shall be punishable by a fine not to exceed ~~$5,000.00~~ $15,000.00, by a term of imprisonment not to exceed ~~one year~~ three years, or both.

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Sec. 14-10.16. - Second degree trespass.

(a) Offense. A person commits the offense of second degree trespass if, without authorization, he enters or remains on the property of another:

(1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or

(2) That is posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the property.

(b) Second degree trespass shall be punishable by a fine not to exceed ~~$1,000.00~~ $5,000.00, by a term of imprisonment not to exceed ~~30 days~~ one year, or both.

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Sec. 14-10.41. - Breaking ~~and~~ or entering.

(a) It shall be unlawful to break into by any force whatsoever ~~and~~ or enter in any manner any dwelling, office, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, garage, tent, vessel, railroad car, airplane, motor vehicle, trailer or semitrailer, mobile home, trunk, drawer, box, coin operated machine, or similar structure, object, device of another without consent, with the intent to:

(1) Cause annoyance or injury to any person therein;

(2) Cause damage to any property therein;

(3) Commit any offense therein, not punishable by imprisonment;

(4) Cause, or does actually cause, whether intentionally or recklessly, fear for the safety of another.

(b) Breaking ~~and~~ or entering shall be punishable by a fine of not less than ~~$250.00~~ $500.00 nor more than ~~$5,000.00~~ $15,000.00, by imprisonment for a period not exceeding ~~one year~~ three years, or both.

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Sec. 14-10.60. - Larceny.

(a) It shall be unlawful to take or carry away any tangible or intangible personal property by fraud or stealth with the intent to deprive the owners thereof. If the value of the property taken or carried away exceeds $1,000.00, it shall be known as grand larceny.

(b) Larceny shall be punishable by a fine not exceeding $5,000.00, by imprisonment for a term not exceeding ~~six months~~ one year, or both.

(c) Grand larceny shall be punishable by a fine not exceeding $15,000.00, by imprisonment for a term not exceeding three years, or both. A sentence of exclusion for a period not exceeding ten years may be imposed in addition to the punishment authorized above.

BE IT FINALLY ORDAINED that all ordinances that are inconsistent with this ordinance are rescinded, and that this ordinance shall become effective when ratified by the Principal Chief.

Submitted by Vice Chief Alan B. Ensley.

The attached Resolution/Ordinance No. 181 dated May July 9, 2020 was:

PASSED (X)

KILLED ( )

and ratified in open Council on July 9, 2020 by 76 voting for the act and 0 members voting against it as follows:

VOTE	FOR	AGAINST	ABSTAIN	ABSENT
Richard French	X			
Perry Shell	X			
Boyd Owle				X
Bucky Brown	X			
Tom Wahneetah	X			
David Wolfe	X			
Adam Wachacha	X			
Bo Crowe	X			
Chelsea Saunooke	X			
Albert Rose				X
Dike Sneed	X			
Tommye Saunooke	X			
	76	0	0	24

TRIBAL COUNCIL CHAIRMAN

Michelle Thompson
ENGLISH CLERK

PRINCIPAL CHIEF

APPROVED (✓) VETOED ( )

VETO UPHELD ( ) VETO DENIED ( )

DATE: 7/20/2020

I hereby certify that the foregoing act of the Council was duly:

PASSED ( )

KILLED ( )

and ratified in open Council after the same has been interpreted by the Official Interpreter and has been fully and freely discussed.

INTERPRETED ( )

OMITTED ( )