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CONSTITUTIONAL LAW: *Whitehorn v. State:* PEYOTE AND RELIGIOUS FREEDOM IN OKLAHOMA

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The case of *Whitehorn v. State*,[1] a recent decision by the Oklahoma Court of Criminal Appeals, through the Honorable Judge C. F. Bliss, Jr., is one of the leading cases, to date, concerning the use of peyote as a sacrament for members of the Native American Church. In holding that "use [carrying on the person] of peyote by the Native American Church members is an intricate part of their constitutionally protected religious beliefs and therefore should be protected from governmental interference,"[2] the court has extended the protection of the first amendment not only to use of peyote in a religious ceremony,[3] but also to "the practice of 'carrying' peyote by members of the Native American Church . . . ."[4] Thus, the Oklahoma court has "legally recognized" the freedom of Native American Church members to pursue their religious beliefs. In discussing the significance of *Whitehorn*, cases from jurisdictions other than Oklahoma must be considered, because *Whitehorn* was a case of first impression.

Statement of the Case

George L. Whitehorn, Otoe-Ponca, was enroute from his home in Red Rock, Oklahoma, to see his father in an Enid nursing home[5] when he was stopped by two uniformed police officers. At that time he was charged with operating a defective motor vehicle, operating a motor vehicle with an expired safety inspection sticker, and driving while his driver's license was under suspension.[6] After being taken into custody, Whitehorn was transported to the county jail in Enid, at which time his personal possessions were confiscated and inventoried. Among those items confiscated was a handkerchief containing what appeared to be peyote and also a necklace which seemed to be made of the same material.[7] Whitehorn admitted to the officers that the material was peyote.[8]

At trial, the vehicle-related offenses were dropped and Whitehorn was charged with possession of a controlled dangerous substance, peyote, in violation of the Uniform Controlled Dangerous Substances Act of the state of Oklahoma.[9] In submit-

ting evidence for the state, the prosecution called only three witnesses. Both arresting officers testified to the aforementioned facts.[10] A forensic chemist for the Oklahoma State Bureau of Investigation testified that the substance confiscated from Whitehorn was peyote and that, "mescaline would be in peyote and...it can be derived from it, but it's two different substances."[11] Following this testimony, the state rested its case. Evidence for the defendant explained the customs, history, and use of peyote in the Native American Church. The defendant also asserted that he was a good faith practitioner and member of the Otoe and Ponca local chapters of the Native American Church. This assertion was corroborated by several witnesses.[12] After trial to the court, a verdict of guilty was handed down against the defendant. The judgment and sentence imposed was for a term of two years' imprisonment with the sentence being suspended.[13]

On appeal, defendant first asserted that possession of peyote is not a crime in Oklahoma because peyote is not specifically listed in Schedule I of the Uniform Controlled Dangerous Substances Act.[14] The court, citing two cases from foreign jurisdictions,[15] held "peyote is a material which contains a quantity of mescaline and therefore its possession is prohibited by the Oklahoma Act."[16] In spite of the legislative history in Oklahoma concerning the use and possession of peyote,[17] the court determined that peyote was included in the Act "by implication."

The defendant next urged that the state failed to demonstrate that the quantity of peyote found on his person was sufficient to cause hallucinogenic effects, thereby rendering its possession legal. In support of this argument, the defendant cited *State v. Moreno*,[18] which held that the burden is on the prosecution to demonstrate that the quantity of the drug possessed was sufficient to cause such hallucinogenic effects. More precisely, "the State must prove possession of a usable quantity."[19] The court rejected this argument, citing *Doyle v. State*,[20] in which the court construed the concept of "usable quantity." In that case, the court noted: "Clearly by the statutory language stating 'which contains any quantity of the following substances' the legislature classified amphetamine as a controlled dangerous substance in any quantity."[21]

Relying on the aforementioned authorities, the court held in *Whitehorn* that "Section 2-204C does not require the State to prove that the quantity of the substance possessed by an accused was sufficient to cause hallucinogenic effects."[22]

Finally, the defendant urged that "even if possession of peyote is

considered a criminal offense the defendant is protected by the First Amendment of the United States Constitution, right to religious freedom, and is granted an exception to the possession law."[23] The state, in reply, argued that the legislative prohibition of the possession of peyote, in spite of the effects it may have on bona fide members of the Native American Church, is a valid exercise of the state police powers. The state, citing several Amish, Morman, and Jehovah Witness cases,[24] argued that the general rule is that the free exercise of religion does not include the right to commit crimes in the name of religion.[25]

In ruling on this issue, the Oklahoma court began with the premise enunciated in the case of *Sherbert v. Verner*[26] that the right to freedom of religion grants an individual the "right to the free exercise of the practices of his chosen religion..." without government intervention or interference, unless a contravening compelling state interest in regulation is shown.[27] This ruling by the court is a rejection of the position taken by the state.[28]

Proceeding from this premise, the court cited *State v. Whittingham*[29] and *People v. Woody*,[30] which relate to the use of peyote by the Native American Church. In those cases, the court noted, the state interest in the regulation of peyote was weighed against the right of members of the Native American Church to practice peyotism. In both instances, the scales were tipped in favor of the Native American Church. In *Whittingham*, the Arizona court dealt at length with the history and development of the Native American Church in North America.[31] In *Woody*, the California court also observed that the Native American Church has a long and distinguished history.[32] It noted that the Native American Church was not "a fad or a part of the popular drug culture."[33] The Oklahoma court also noted that the Native American Church had been incorporated in the state of Oklahoma since March 18, 1920, under the early name of "Church of the First Born."[34]

State courts have also looked to federal regulations for guidance. The Bureau of Narcotics and Dangerous Drugs has responded by issuing a limited regulation pertaining to "religious ceremonies of the Native American Church."[35] This regulation states that the "non-drug" use of peyote is not subject to federal control. The same type of an exception for religious use of peyote in bona fide religious ceremonies of the Native American Church also appears in regulations issued by the Secretary of Health, Education and Welfare.[36] The constitutionality of these regulations has been tested in federal court with no majority view emerging.[37]

The Commissioner of Narcotics and Dangerous Drugs of the state of Oklahoma has also passed rules and regulations granting an exemption of this nature to Native American Church members.[38] The state legislature, in promulgating the Uniform Controlled Dangerous Substances Act,[39] vested the Commissioner of Narcotics and Dangerous Drugs with this rule-making authority.

After noting the aforementioned state and federal regulations exempting Native American Church members from peyote possession laws, the court ruled that the state failed to present evidence that would sustain a finding of a state interest in regulation compelling enough to prevail over the religious rights of Native American Church members.[40] The court held:

> It is, therefore, our opinion that in a prosecution for possession of peyote under the provisions of the Uniform Controlled Dangerous Substances Act it is a defense to show that the peyote was being used in connection with a bona fide practice of the Native American Church and that it was *used or possessed* in a manner not dangerous to the public health, safety or morals.[41]

Even though this holding is not substantially different than those set forth in *Woody* and *Whittingham*, the Oklahoma court clarified this principle in relation to the facts of the instant case. It is at this point the court begins to break new ground.

In applying this rule of law, the court divided the statement into two distinct areas of inquiry. First, the court asked, "Who is a member of the Native American Church? Or, more accurately, how is that determination made?"[42] Second, the court asked, "[W]hat constitutes a 'connection with a bona fide practice'?"[43]

The requirement of Church membership to sustain a defense is a more difficult question to approach than the latter requirement. It is an issue of fact in the nature of an affirmative defense which must be proven beyond a reasonable doubt to the jury by credible evidence. In allocating this burden to the trier of fact, the court limited the jury's inquiry to the determination of, "whether the claimant is a member of the Native American Church or merely claims membership as a cloak for illegal possession or use of peyote."[44] Quoting *Woody*, the court stated:

> "We do not doubt the capacity of judge and jury to distinguish between those who would feign faith in an esoteric religion and those who would honestly follow it. 'Suffice it to say that trial courts will have to determine in each instance, with whatever evidence is at hand, whether or

not the assertion of a belief which is protected by the First Amendment is in fact a spurious claim.' *(In re Jenison* supra, 125 N.W.2d 588, 590) Thus the court makes factual examination of the bona fides of the belief and does not intrude into the religious issue at all; it does not determine the nature of the belief but the nature of defendant's adherence to it." See, also *In re Grady*, Cal., 394 P.2d 728 (1964).

Complete church rosters, although the best form of evidence to prove this element, are not an available nor reasonable source of proof. As the court noted, no church under United States jurisdiction has ever been required to enroll all its members in order to enjoy religious freedom.[45] Furthermore, only the Caddo Chapter of the Native American Church in Oklahoma has a complete list of its members.[46] In the absence of rosters, the courts must look to other forms of evidence. Oral evidence is the obvious alternative. At trial,uncontroverted oral testimony established that Whitehorn was a member of the Otoe and Ponca chapters of the Native American Church.[47] Whitehorn testified that he was a member and had attended approximately thirty meetings since he was eight or nine years of age. He based his assertion of membership on the fact that "he was an Indian and had chosen the Church...."[48] Other witnesses corroborated Whitehorn's testimony as to his membership, while no witness for either side could affirmatively state that Whitehorn was not a member.[49] Considering the testimony adduced at trial relating to membership, the court said: "[W]e feel there was much positive evidence demonstrating defendant's membership in the Native American Church that is not incredible and which is uncontradicted."[50]

Other means of proof have been explored in other jurisdictions. *Golden Eagle v. Johnson*[51] is a Ninth Circuit case based on facts almost identical to *Whitehorn.* The appellant, Golden Eagle, sought damages, injunctive relief, and a declaration that certain California laws were unconstitutional. He argued that under the first and fourteenth amendments of the United States Constitution, an arrest for the possession of peyote should be, at the very least, preceded by an adversary hearing to determine if the accused was in possession of the peyote for a bona fide religious purpose.[52] He further urged two additional alternatives that were required by the amendments; first, an *ex parte* showing that there was probable cause to believe the peyote was *not* being used for a bona fide religious purpose; second, the arresting officers should make a good faith effort to check the good faith of the religious

claims of the person in possession before he is arrested.[53] The appellant based these assertions on the fact that the required alternatives should be designed to minimize interference by the state of bona fide religious use of peyote.[54]

In an adept display of judicial hocus-pocus, the court in *Golden Eagle* refused to rule on the validity of the first amendment freedom of religion as applied to the use of peyote, while at the same time denying appellant's arguments relating to prearrest procedures. In refusing to pass on the first amendment question the Court noted, "[O]ur notions of judicial restraint outweigh this consideration."[55] The court's statement reflects a narrow-minded philosophy that smacks of colonial puritanism. The Oklahoma court is obviously not shackled by such antiquated dogma.

A further example of statutory treatment is seen in the state of Texas, which has exempted Native American Church members from culpability under their drug prohibition statutes.[56] This exemption for use in bona fide religious ceremonies by members of not less than 25 per cent Indian blood is supplemented by the requirement that those persons who *supply* peyote to the Church must register and keep appropriate records in accordance wth rules promulgated by the "director." The term "director" is defined by statute as the "Director of the Texas Department of Public Safety or an employee of the Department designated by him."[57] Pursuant to this authority, the Director promulgated "Requirements for Registration as Peyote Distributor."[58] These regulations set up a bureaucratic obstacle course of registration, record-keeping, and disclosure which appears to be all but prohibitive in application. One wonders what percentage of "distributors" in Texas have adhered to these rules. This is significant because the Rio Grande Valley is the major source of peyote for the North American tribes.[59]

Ironically, peyotism has also been prohibited in at least one reservation area. The Navajo tribal ordinance prohibiting peyote use has been upheld on two separate occasions.[60] In one case, the court ruled it lacked jurisdiction to hear an attack on a tribal ordinance, even though it might affect religious freedom, while in a later case the cause of action was dismissed primarily because of mootness.

In addressing the second area of inquiry, namely, "what constitutes a 'connection with a bona fide practice'?,"[61] the Oklahoma court observed, "At first blush this question appears also to be for the trier of fact, but it is not. It is a matter of law for the courts to decide."[62] Therefore, if the use in question is deemed to be "con-

nected with a bona fide practice" by the trial judge, he must so instruct the jury. This, coupled with a finding of membership by the jury, satisfies the affirmative defense. The act sought by the defendant to be protected by the first amendment is the simple possession of peyote. The defendant stated at trial that he was carrying peyote, at the time of his arrest, because he had put the buttons in his pocket while cleaning his room earlier, but failed to replace them before he left the house.[63] The practice of carrying peyote by Native American Church members was described at trial by one witness as "something that is very holy and religious to our people."[64] This testimony was corroborated by other evidence adduced at trial and on appeal.[65] Relying on these facts, the court held "there has been no state interest shown compelling enough to prevent the Native American Church members from possessing their sacred, sometimes 'inherited,' peyote and from transporting the same on their person within the State of Oklahoma."[66] By using this language, the court recognizes that this practice is connected with a bona fide religious use, thereby protecting it from government interference. There apparently has been no such ruling in any other jurisdiction.

Conclusion

The value of the *Whitehorn* decision will be judged only by time. The practical application in the everyday lives of Oklahoma Indians will be the determinative factor. If law enforcement officials and prosecutors refuse to adhere to the principles set forth in *Whitehorn* and harass good faith members of the Native American Church for possession of peyote, then the holding will be worth little more than the paper it was printed on. However, if law enforcement officers heed the significance of *Whitehorn*, the religious practices of good faith Native American Church members will no longer be stymied by well meaning officers. In practice, when a Native American Church member is found by law officers to be in possession of peyote, if it is obvious that the peyote is for religious observance only, the officers should not report the possession. If they do, the district attorney then should weigh the circumstances and determine if charges should be filed. The accused should provide any type of proof deemed appropriate.

While allowing for prosecutions of "those who would use peyote for non-religious purposes committing sacrilege against the Church and in violation of the drug laws of the State,"[67] the

Oklahoma court has tried to minimize the chilling effect of government interference with religious practices, while allowing prosecution of those who use peyote for nonreligious purposes. The desirability of having membership rosters or any other form of proof of membership is left entirely in the hands of the Board of Trustees of the Native American Church, as is the membership requirements of who may or may not become a participant in the Native American Church. In balancing the competing interests of the state and the Native American Church, the Court of Criminal Appeals of Oklahoma attempted to clarify the rights of each party and arrived at a well-educated and sensitive solution to a most perplexing problem.

NOTES

1. 561 P.2d 539 (Okla. Cr. 1977).
2. *Id.* at 547.
3. *Id.* at 544, *citing* State v. Whittingham, 19 Ariz. App. 27, 504 P.2d 950 (1973).
4. *Id.* at 547.
5. At the time Whitehorn was detained, he said he was on his way to learn some peyote songs from his father. His father is one of the very few Otoes who know these songs. *Id.*
6. *Id.* at 541.
7. *Id.*
8. *Id.*
9. 63 OKLA. STAT. § 2-204(c) (1971, Supp. 1976).
10. 561 P.2d 539, 541 (Okla. Cr. 1977).
11. *Id.*
12. *Id.* Seven witnesses were called by the defendant and three by the prosecution to testify to facts relating to the Native American Church. Of these ten persons, several stated that they knew the defendant to be a member of the Native American Church, but no one could testify that they knew the defendant was *not* a member.
13. *Id.* at 540.
14. 63 OKLA. STAT.§§ 2-204 (1971, Supp. 1976).
15. Ellis v. State, 132 Ga. App. 684, 209 S.E.2d 106 (1974); State v. Riggins, 11 Wash. App. 449, 523 P.2d 452 (1974).
16. Whitehorn v. State, 561 P.2d 539, 543 (Okla. Cr. 1977).
17. On Mar. 11, 1899, the Oklahoma Territorial Assembly passed a statute which prohibited the possession of any "Mescal Beans." This prohibition was carried over into Oklahoma statehood. It was later included in the Compiled Laws of Oklahoma in 1909. However, in 1910, Section 2784 was omitted from the Revised Laws of Oklahoma. Thereafter, attempts were made to enact new legislation prohibiting the possession of peyote in 1909, in 1927, and on Jan. 30, 1967, but all attempts met death in committee and were never enacted into law. When the Oklahoma legislature adopted the Federal Uniform Dangerous Substances Act, the item "Peyote" was struck from Section 204, Schedule I, Paragraph (c). *See generally* Brief of Amicus Curiae, by Leo Whinery for the Kiowa-Otoe chapters of the Native American Church.
18. 92 Ariz. 116, 374 P.2d 872 (1962) (use of heroin).
19. 561 P.2d 539, 544 (Okla. Cr. 1977).
20. 511 P.2d 1133 (Okla. 1973).
21. *Id.* at 1136. *See also* State v. Jefferson, 391 S.W.2d 885 (Md. 1965).
22. 561 P.2d 539, 544 (Okla. Cr. 1977).
23. *Id.*

24. *See generally* Chaplinsky v. New Hampshire, 315 U.S. 568 (1949); Cleveland v. United States, 329 U.S. 14 (1946); Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1 (1890); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). *Contra* Wisconsin v. Yoder, 460 U.S. 205 (1972).

25. Whitehorn v. State, 561 P.2d 539 (Okla. Cr. 1977), Appellee Brief at 24-28.

26. 374 U.S. 398 (1963).

27. 561 P.2d 539, 544 (Okla. Cr. 1977).

28. Appellee Brief, *supra* note 25, at 25.

29. 19 Ariz. App. 27, 504 P.2d 950 (1973).

30. 61 Cal. App. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

31. 19 Ariz. App. 27, 504 P.2d 950, 951-52 (1973).

32. 61 Cal. App. 2d 716, 394 P.2d 813, 817-18, 40 Cal. Rptr. 69 (1964).

33. 561 P.2d 539, 544 (Okla. Cr. 1977).

34. *Id.* at 541 n.1. A reading of the Articles of Incorporation of this group reveals that Harrison Whitehorn, the defendant's uncle, from whom the defendant "inherited" the peyote confiscated at the time of his arrest, is listed as one of the trustees of the Church. His signature appears on the original Articles of Incorporation.

35. 21 C.F.R. § 320.3(c)(3) (1975). Peyote is designated as a hallucinogenic drug regulated by 21 C.F.R. § 320.2 (1975), under authority of the Federal Food, Drug and Cosmetics Act. 21 U.S.C. § 301 (1975).

36. 21 C.F.R. § 166.3(c)(3) (1973).

37. Kennedy v. Bureau of Narcotics & Dangerous Drugs, 459 F.2d 415 (9th Cir.), *cert. denied*, 409 U.S. 1115, *reh. denied*, 410 U.S. 959 (1972), held that the special exemption for Native American Church members created an arbitrary classification, rendering it unconstitutional. *Contra*, United States v. Kuch, 283 F. Supp. 439 (D.C. 1968). Generally, *Drug Crime Defense—Religious Freedom* 35 A.L.R. 3d, 939.

38. Rule 900.07.

39. 63 OKLA. STAT. § 2-106 (1971, Supp. 1976).

40. 561 P.2d 539, 544 (Okla. Cr. 1977). For cases in which a compelling state interest was shown, *see* Lewellen v. State, 489 P.2d 511 (1971); State v. Soto, 537 P.2d 142 (Ore. 1975).

41. 561 P.2d 539, 544-45 (Okla. Cr. 1977) (emphasis added).

42. *Id.* at 545.

43. *Id.*

44. *Id.*

45. *Id.*

46. Appellee Brief, *supra* note 25, at 6-7.

47. 561 P.2d 539, 544-45 (Okla. Cr. 1977).

48. *Id.*

49. *Id.*

50. *Id.*

51. 493 F.2d 1179 (9th Cir. 1974).

52. *Id.* at 1183.

53. *Id.*

54. *Id.*

55. *Id.* at 1183.

56. TEX. STAT. ANN. TIT. 71 § 4476-15 (4.11) (1965).

57. TEX. STAT. ANN. TIT. 71 § 4476-15, 1.02(B)(9) (1965).

58. 201.07, 11.001-004.

59. *See generally* W. LA BARRE, THE PEYOTE CULT (1959).

60. Native American Church v. Navajo Tribal Council, 272 F.2d 131 (10th Cir. 1959); Oliver v. Udall, 306 F.2d 819 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 908 (1963).

61. 561 P.2d 539, 547 (Okla. Cr. 1977).

62. *Id.*

63. *Id.* at 541.

64. *Id.* at 547.

65. *Id. See generally*, W. LA BARRE, THE PEYOTE CULT (1959).

66. 561 P.2d 539, 547 (Okla. Cr. 1977).
67. *Id.* at 548.